SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 10

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

STEVE NELSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

BRIEF FOR THE RESPONDENT

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Questions Presented For Review

1. Did Title I of the Act of June 28, 1940; 54 Stat. 670, popularly known as the Smith Act, supersede the Pennsylvania Sedition Act of June 26, 1919, later codified as Section 207 of the Penn. Penal Code of June 24, 1939, (18 Purd. Penna. Stat. Sec. 4207).

2. Is the indictment under which defendant was tried constitutionally valid?

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Nature of the Proceedings

Respondent Steve Nelson was indicted on October 17, 1950 for violation of Section 207 of the Penal Code of Pennsylvania entitled "Sedition" (18 Purd. Penna. Stat. Sec. 4207) (R. 9). The indictment will be fully analyzed in Part Two below; it is in twelve counts, each of which purports to allege the elements of a crime under the Pennsylvania Statute.[1]

[1] The text of the statute is set forth in full at pp. 3, 4, of the petitioner's brief. (The text of the Smith Act is also set forth in full in petitioner's brief, p. 2.)

The case came on for trial before Hon. Harry M. Montgomery in the Court of Quarter Sessions of the Peace for Allegheny County on December 4, 1951 (R. 33) and, after certain preliminary proceedings, a jury was chosen and sworn on December 17 and December 18, 1951 (R. 7). The jury returned a verdict of guilty on January 30, 1952 (R. 7). A motion for a new trial was duly made and denied, with opinion by Judge Montgomery dated June 26, 1952 (R. 28-49). On July 10, 1952 Nelson was sentenced to a term of twenty years, fined Ten Thousand Dollars and directed to pay the costs of the prosecution (R. 8). He remained in custody from July 10, 1952 until February 20, 1953 when he was released on bond of Twenty Thousand Dollars, pursuant to order of the Pennsylvania Supreme Court dated February 13, 1953.

In the meantime an appeal was taken to the Superior Court of Pennsylvania which, on November 12, 1952, affirmed the decision of the trial court, on the opinion of Judge Montgomery (R. 50). Respondent took a further appeal to the Supreme Court of Pennsylvania which on January 25, 1954, reversed by a 4-1 vote, (2 judges not sitting) and ordered that the indictment be dismissed (R. 50-92).

In the trial court, the Superior Court and the Supreme Court, respondent urged many questions for review, some of which went to the validity of the statute and indictment, and others of which went to the conduct of the trial. The contentions made by the respondent to the State Courts are summarized in the opinion of the Supreme Court (R. 51-53). That Court, however, found it unnecessary to pass on any but the first of Respondent's contentions, namely that the Pennsylvania Sedition Act was superseded by the enactment by Congress of Title I of the Act of June 28, 1940, commonly known as the Smith Act.

Statement of Facts

This case really had its beginnings early in 1950. At the end of February of that year, one Matthew Cvetic testified before a Congressional Committee concerning the activities of the Communist Party in Pittsburgh, of which he had allegedly become a member as an undercover agent for the Federal Bureau of Investigation. This testimony received sensational front page publicity in the Pittsburgh press. Scores of local residents were named by Cvetic as members of the Communist Party and were listed in Pittsburgh newspapers by name, address, and where available, places of employment. Particular publicity was given to the alleged activities of respondent Nelson, Andrew Onda and James Dolsen.[2]

This was followed by a constant and vociferous clamour in the press for prosecution of the communist leaders, particularly Nelson, Dolsen and Onda. The respondent was variously described as a spy, saboteur, gangster, traitor and atheist, in banner headlines, usually accompanied by photographs.

Some years earlier, an organization named Americans Battling Communism had been formed, Judge Montgomery being an incorporator and a member of its executive committee (R. 48). Early in 1950 this group was active in con-

[2] Reference to every newspaper story on the Cvetic testimony would require the listing of almost every issue of each of the three Pittsburgh daily papers for three or four weeks after February 27, 1950. This material is not in the printed record before this court; it is, however, in large part included in the motion for a change of venue made originally in Nelson's first trial, (see below p. 5) and incorporated by reference in this trial. (R. 2-6, 107, 111). Much of the same material was used in support of a motion for a change in venue in *Messersmith et al. v. United States*, 228 F. 2d 149 (CA 3, 1955), in which respondent was convicted of violation of the Smith Act. That case is now pending in this Court on a petition for a writ of certiorari to the Court of Appeals for the Third Circuit October Term, 1955, No. 205 Misc. See I R. 1043, 87-93, III R. 263-310, 362-378 in that case.

ducting its own campaign against communism (R. 141, 142); in fact it had paid the expenses of Cvetic's trip to Washington (R. 768-770). In March of 1950, a few days after Cvetic's testimony was completed, the organization announced that it had collected enough evidence to indict Nelson and other communists in the area. It stated that such evidence was being made available to the prosecuting authorities and called for Nelson's indictment (R. 141).

On July 19, 1950 Judge Michael A. Musmanno, then Judge of the Court of Common Pleas of Allegheny County,[3] and a candidate for Lieutenant Governor of Pennsylvania (R. 393), accompanied by two City detectives, visited the offices of the Communist Party and purchased a number of books, pamphlets, and newspapers from its book shop, Dolsen making the sale (R. 180, 201, 324, 327).

On August 28, 1950 Judge Musmanno filed informations charging Nelson, Onda and Dolsen with sedition, proceeding under a State statute which permits a private citizen to bring a private prosecution for violation of a penal law (16 P. S. 3432) (R. 377). Warrants were issued for the arrest of the three defendants by a fellow Judge of the Court of Common Pleas (R. 175, 176), who also issued a search warrant for the search of the Communist Party headquarters (R. 168-170). The warrants were directed to the City detectives who had accompanied Judge Musmanno in his visit to the Communist Party office on July 19 (R. 168-170). The warrants of arrest were executed at 2:30 shortly after midnight on the morning of August 31, 1950 (R. 175, 176).

Late in the morning of the same day, the search warrant was executed by the City detectives, accompanied by Judge Musmanno and Cvetic (R. 170, 462). Upon the execution of

[3] As such, he sat as judge of both the Court of Common Pleas, and the Court of Quarter Sessions, which is the court of original criminal jurisdiction in Pennsylvania.

this warrant, Musmanno and Cvetic had complete run of the office and seized such books, papers and documents as they chose, taking the same to Musmanno's chambers where they remained for some time (R. 171, 173, 405). A few days later Musmanno petitioned the Court of Common Pleas for an order to padlock the Communist Party offices, which petition was granted on September 5, 1950 (R. 171, 402). Subsequently, the State Supreme Court voided the padlock order as a "continuing wrong and without warrant in law" (R. 404). The Court of Common Pleas, again on petition of Musmanno thereupon entered a new order on October 2, 1950 directing the Sheriff to seize the entire contents of the Communist Party office. That order was in fact executed and the books and other papers found in the Communist Party offices were seized by and retained by the Sheriff at that time (R. 175).

Needless to say, all of this was accompanied by the publicity one might expect from the spectacle of a State Judge, and candidate for state-wide office, making a personal raid on Communist Party headquarters. The banner headlines reappeared, the "atomic spy" and "saboteur" charges were revived, and the photographs were repeated.[3]

In the meantime, Harry Alan Sherman, President of American Battling Communism, appeared before the grand jury, as did Cvetic and Musmanno (R. 20). On October 17, 1950, the grand jury returned three separate, but identical, indictments against Nelson, Dolsen and Onda.

Preliminary motions for dismissal of the indictments, bills of particulars, change of venue and other relief were all denied, and the trial of the three defendants commenced before Judge O'Brien on or about January 12, 1951 (R. 2). During the course of the trial and in May 1951, Nelson was seriously injured in an automobile accident. His case was

[3] See footnote 2 above, and any Pittsburgh paper for the period.

accordingly severed (R. 2) and was called again, after an intermediate continuance, on December 3, 1951. On that day the case came up again for assignment to a judge for trial, Judge Musmanno happened to be acting as assignment judge for the day (R. 385). He requested Judge Montgomery to substitute for him because the Nelson case was on the calendar. Judge Montgomery took Judge Musmanno's place in the assignment part, and, despite his association with Americans Battling Communism and its part in securing Nelson's indictment, he assigned the case to himself for trial (R. 385, 386).

Nelson requested a continuance until after the Christmas holidays, recounting his extreme difficulty in securing counsel, and stating that he had counsel who would be available after January 1st. In the course of his application he stated that he had contacted, through the mail and otherwise, seven hundred lawyers in Pittsburgh, of whom he had spoken to forty personally; he had visited lawyers in New York, Reading and Philadelphia, and had corresponded with many others. He had written to the Allegheny County Bar Association and other Bar Associations without result. Despite these efforts not one member of the local Bar would agree to represent Nelson. The counsel he had obtained were from out of the State but were unable to make themselves available until January 1st (R. 94-96, 103, 106, 111, 138-140).

Nelson's application was denied, and after proceedings which need not be summarized here, he was compelled to proceed without counsel.

The trial was an unusual one from beginning to end. It partook more of the nature of a political debate than a judicial proceeding—a debate in which, unfortunately, all, from counsel to witnesses, to parties participated. The District Attorney, from his opening to the jury to his summation engaged in highly inflammatory speeches in the course of

which the respondent was frequently charged with espionage, sabotage and treason, although no such charge was contained in the indictment (R. 159, 162, 163, 1335-1338, 1353-1354, 1363). The District Attorney was aped by prosecution witnesses, and the defendant, unable to express his feelings in the unfamiliar courtroom setting in which he found himself, answered in kind. The Judge exercised little restraint over the proceedings which sometimes degenerated to the point where they resembled a gutter brawl.

The testimony of Judge Musmanno was characteristic of the rest of the trial. He was a prime witness for the prosecution. He testified at length, describing in characteristically colorful language, the appearance of the party headquarters on his visits (R. 182-192). He identified hundreds of documents which had either been purchased at those headquarters on July 19 or seized in the raid of August 31. He read excerpts from about thirty-five documents to the jury and then identified over one hundred additional books and documents which were introduced *en masse*, without reference to the contents and without reference to any particular portions thereof which were claimed to be relevant (R. 203, 215-323).[5]

He had never met Nelson until the night of Nelson's arrest and he did not testify at all as to any conduct of appellant (R. 406). In the midst of his testimony he was sworn in as a Judge of the State Supreme Court, an office to which he had been elected in the 1951 general election (R. 445, 500), but his conduct, both before and after the date on which he took office, fell far short of the norm usually ex-

[5] Exhibits 67-116, 128, 131, 132, 134, 139-143, 145, 146, 149-152 and 154-156 are 68 documents, offered in evidence, *en masse*, without reference to any part thereof on which the prosecution relied. Included were many works on religion, art, literature, history, economics and philosophy. Their bulk admission into evidence caused the respondent to remark (R. 282): "Why don't the prosecution put it on a scale. . . .; do it by the pound. What is the difference what's in them."

pected of judicial officers, even on those rare occasions when they appear as witnesses or litigants.[6] He was unruly, argumentative and undignified (e. g. R. 185-189; 328, 329, 343, 375, 376, 381, etc.). On one occasion he called the appellant a skunk and a traitor, and appellant called him a rat and a fascist (R. 432, 433). So loosely controlled was the trial that such outbursts were frequent.

There is no necessity to discuss the rest of the trial. The errors in the trial (and there were many) need not be noted at this time as they are not presented to the court on this writ.[7]

The case was submitted to the jury on the theory that each paragraph of the indictment constituted a separate count. The jury returned a verdict of guilty, and the court, on this record and background, imposed a twenty year sentence of imprisonment plus a Ten Thousand Dollar fine.

In the midst of the proceedings described above, and indeed, while Onda and Dolsen were still on trial before Judge O'Brien, Nelson and others were indicted for violation of the Smith Act in the United States District Court for the Western District of Pennsylvania. In October, 1952, he moved to dismiss on grounds, *inter alia* of double jeopardy. That motion was denied, and Nelson was ultimately convicted under the Smith Act. The Supreme Court of Pennsylvania has observed: "The acts proven in the Federal Court to effectuate the alleged conspiracy con-

[6] Needless to say, Musmanno's status as a judge was made evident enough during his trial. When he was asked his occupation, he answered: "I am a Judge, but in this proceeding I am acting as a private citizen. And I would prefer to be referred to as 'Mr. Musmanno' and not 'Judge Musmanno'" (R. 177). This request by the witness was, of course, promptly disregarded. (R. 178, 187, 206, 208, etc.)

[7] Judge Musmanno has written his version of the trial and the events leading up to it. See Musmanno: *Across the Street from the Courthouse* (Dorrance and Company, Philadelphia, 1954).

sisted of practically the same matter as was offered against Nelson in the trial in the State Court" (R. 60).

As is noted above, Nelson's Smith Act conviction is now before this Court on a petition for certiorari *sub nomine* *Mesarosh v. United States*, Oct. Term, 1955, No. 295 Misc.

SUMMARY OF ARGUMENT

Part One

I

The issue here is a narrow one, namely, whether the state can enact or enforce a law making sedition "against the United States" a crime in the face of an identical federal law on that same subject. The issue is not, as contended by petitioner and those filing amici briefs in its support, whether the state can make sedition against itself, or against established government generally a crime, or whether the state can cooperate in the enforcement of the federal law on the subject. As found by the Pennsylvania Supreme Court, respondent was tried under a state statute proscribing sedition against the United States as such, and convicted under evidence of sedition against the federal and not the state government.

II

It is important to remember that the power which has been exercised by the federal government in enacting the Smith Act, arising as it does from the highest of constitutional authority (Article I, Sec. 8; Article IV, Sec. 4) is one which "springs from the very roots of political sovereignty" and involves the "most pervasive aspect of sovereignty". Sedition against the United States is a subject, as indicated by the Solicitor General, "where the national interest is obviously paramount". Furthermore, consideration of the nature and source of the threat of sedition

indicate that the problem is not a local one suitable for local handling but rather, again as noted by the Solicitor General, "it is a national problem which calls for solution on a national scale". Finally, as indicated by the legislative history of the Smith Act and the Congressional findings preceding the Internal Security Act of 1950 and the Communist Control Act of 1954, the problem involves questions of international politics and of foreign policy peculiarly within the competence and authority of the federal government to handle.

The foregoing considerations not only indicate paramount federal interest but also that the subject matter is not one within the traditional scope of state authority reserved to the states under the Constitution. State sovereignty and jurisdiction has traditionally been deemed to exist only with respect to matters which affect the citizens of that state alone and not to matters which affect citizens of other states or of the Nation as a whole. Sedition against the United States does not involve or concern simply the State of Pennsylvania, it concerns every other state in the Union, and no interests peculiar to citizens of the State of Pennsylvania are here involved.

III

Since the subject here is one in which the national interest is dominant and which involves the actual exercise of a paramount national power delegated under the Constitution to the federal government and not to the states, and since the state is not exercising a traditional aspect of its reserved powers to protect its citizens from dangers customarily protected against under the state police power, the present case must be disposed of far differently from cases where jurisdiction and powers of the state and federal governments are concurrent so that each is legislating in a field properly and traditionally its own, and where the fed-

eral government has not taken a particular subject specifically in hand. In a case such as the instant one, presumptions that state laws are not superseded are inapplicable; on the contrary, an entirely opposite presumption arises that state laws are preempted unless Congress has affirmatively indicated an intention that its jurisdiction be shared. Since Congress has not so indicated, either in the language of the Smith Act itself or in its legislative history, the federal law supersedes the state. *Houston* v. *Moore*, 5 Wheat. 1; *Hines* v. *Davidowitz*, 312 U. S. 52.

Even though the state may have legislated within an area of its reserved powers, nevertheless since the subject is of dominant federal interest, and since the Congress has legislated specifically in the premises, the same rule is applicable. *Cooley* v. *Port Wardens*, 12 How. 299.

Indeed, even though state and federal powers and interests be considered concurrent and equal, nevertheless where Congress has passed specific legislation in the exercise of a power delegated to it, that legislation must be deemed to supersede identical state law on the same subject in the absence of clear indication to the contrary. *Prigg* v. *Pennsylvania*, 16 Pet. 539; *Charleston & W. C. R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597; *Missouri P. R. Co.* v. *Porter*, 273 U. S. 341; and see dissenting opinions in *California* v. *Zook*, 336 U. S. 725, 738, 741 where the entire subject is discussed at length.

IV

Additional factors indicative preemption are as follows:

1. Congress, by enacting not only the Smith Act but also the Internal Security Act of 1950 and the Communist Control Act of 1954, has occupied the field. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148; *Garner* v. *Teamsters Union*, 346 U. S. 485.

2. The state law conflicts with the federal, both as to procedures and penalties, so that the two laws cannot consistently stand together. *Southern Railway Co.* v. *Reid*, 222 U. S. 424; *Hill* v. *Florida*, 325 U. S. 538.

3. The state act stands as a potential obstacle to the accomplishment of federal purposes. *Hines* v. *Davidowitz*, *supra*. Premature disclosure of persons under federal surveillance or of informers are not only possible but are probable in view of the fact that the Pennsylvania law permits prosecutions to be instituted by private information. Indiscriminate or spasmodic enforcement of the state law might very well have the same hindering effect.

V

A final and very important factor which militates against non-supersedure is found in the fact that double or even multiple punishment for the commission of the identical crime would be inflicted if both state and federal laws are permitted to stand. It cannot be presumed that Congress, in passing the Smith Act, intended, without clearly so indicating, to create a condition which is "something very much like oppression, if not worse" (*Houston* v. *Moore*, *supra*) or to deny an "important aspect of civil liberties".

Moreover, prosecution of the respondent for a single offense in both the state and federal courts might make available to him a plea of double jeopardy in his federal court prosecution. This would permit a state, or even a county or municipality, by commencing its own prosecution for sedition against the United States to oust the federal government of its ability to prosecute under the Smith Act. Congress could never have intended such an eventuality.

VI

To argue that acts of sedition against the United States are *ipso facto* acts of sedition against the state forgets the

different sovereignties of the two governments, each operating within its constitutionally different spheres of jurisdiction and each possessing different political capacities. To constitute sedition against the state as such, it is not enough to engage in sedition against the United States generally, but it must be done against the state in particular. The fact that the state might have a deep interest in suppressing sedition against the United States does not confer jurisdiction on the state to make the federal crime its own any more than would a similar interest confer jurisdiction on the state to declare war because hostile activities of a foreign nation threatens the lives and property of its citizens, or to make it a state crime for an individual to fail to pay a federal income tax, or to regulate unions by barring communist representation therein, or to limit the use of the mails by known Communists.

The doctrine that the same act or activities might violate the law of both state and federal sovereignties is applicable only where two separate crimes are involved, one passed pursuant to a valid federal policy and the other pursuant to a valid state policy, each within the jurisdiction and competency of the two sovereignties involved, so that the state and federal law occupy different planes and not the same plane as in the present case. *Southern Railway Co. v. Railroad Commission*, 236 U. S. 439; *In Re Heff*, 197 U. S. 488.

The courts have held that the crime of treason against the United States is punishable only by the federal and not by the state government, and that principle is applicable here. *Ex parte Quarrier*, 2 W. Va. 569 (1866); *People v. Lynch*, 11 Johns 549.

The case of *Gilbert v. Minnesota*, 254 U. S. 325, strongly relied on by petitioner, can be distinguished on the ground that the law there involved, unlike the Pennsylvania law

in the present case, was construed to have as its purpose the prevention of breaches of the peace. Furthermore, the majority opinion therein neither discussed nor distinguished the doctrine of *Houston* v. *Moore*, *supra*, or *Cooley* v. *Port Wardens*, *supra*. *Whitney* v. *California*, 274 U. S. 357, and *Gitlow* v. *New York*, 268 U. S. 652, also relied on by petitioner, are not relevant because the supersession issue was neither argued in the briefs nor discussed by the court. Furthermore, neither case involved a law making it a state crime to subvert against the United States as such.

VII

Various practical considerations negative Congressional intent to permit the states to share its jurisdiction. To begin with, it should be noted that if the decision below is affirmed, state laws on the subject of sedition will be superseded in only a very narrow area, namely, in respect to the outlawing of acts of sedition against the United States Government as such. States remain free to protect against sedition directed at their own governments and to cooperate fully in the enforcement of the federal law and in the apprehension of possible violators of that law. The federal record of conviction of communist leaders on all levels of authority, as well as the Annual Reports of the Attorney General and the Federal Bureau of Investigation, indicate that federal enforcement of the Smith Act will be neither dilatory nor ineffective but, on the contrary, that strict federal enforcement can be expected. Thus there is no need for duplicate state law on the subject. Furthermore, the nature and the source of the threat of sedition against the United States suggests that the problem should be left to competent professionals in the various enforcement agencies at the federal level. Since the apprehension and prosecution of would-be violators of the Smith Act is delicate work and cuts close to the rights and liberties of individual citizens, the practi-

cal consequences in the field of civil liberties of permitting a dual system of ferreting out and punishing sedition indicates strongly the need for the handling of the problem on the federal level alone. Enforcement of the various state laws on the subject might very well be inconsistent with the standards of personal freedom and impartial justice which comprise our American system; the record in this very case so indicates.

PART TWO

In addition to the ground urged by the Pennsylvania Supreme Court for its decision dismissing the indictment, there are other constitutional points which might be considered by this Court under the rule set forth in *Langnes* v. *Green*, 282 U. S. 531, 536. Respondent therefore urges that in any event an affirmance of the decision of the court below is required because the indictment is on its face constitutionally invalid. It is so vague and uncertain as to fail completely in affording to the respondent the notice required by due process of law. Furthermore, many of the counts of the indictment fail to allege any intent and without wrongful intent no crime is possible in this area. Still others of the counts merely accuse the respondent with having sought to hold the government of the United States up to hatred and contempt, a charge which is not permissible under the First and Fourteenth Amendments to our Constitution.

ARGUMENT

PART ONE

I

Introduction

THE ISSUE, THE GENERAL PRINCIPLES APPLICABLE THERETO AND RESPONDENT'S POSITION

The present case requires this Court once again to assume the difficult but necessary task of reconciling concurrent

federal and state law—here in respect to the vitally important subject of sedition against the United States. It is obvious that the sovereignties involved, both state and federal, have a deep interest in the apprehension and punishment of those who would overthrow the federal government by unconstitutional means; it seems equally obvious that the primary responsibility lies with the federal government. The state sovereignties however, insist on an equal and concurrent right to make the specific federal crime of sedition against the United States their own, even though the federal government has legislated in the field. The problem, therefore, is not whether the Congress, having made sedition against the United States a crime, can be said to have intended to supersede state law on that same subject; it is rather whether under such circumstances Pennsylvania or other of the states, without the express or implied consent of Congress, may constitutionally share this federally-exercised jurisdiction to protect the federal, as distinguished from the state, government against would-be perpetrators of that crime.

Preliminarily, it must be noted, as will be discussed below, that the Smith Act represents an actual and explicit exercise by the Congress of important powers and responsibilities entrusted to it and not to the states; that the Pennsylvania Act here involved, as construed by the Supreme Court of that state, is in substance identical with the Smith Act; and finally, that the Smith Act, in express terms, neither grants nor withdraws Congressional consent to the sharing of the jurisdiction which has been exercised thereunder. Furthermore, the legislative history of that Act does not clearly indicate an intent either to grant or withdraw such consent;[8] the petitioner's and supporting amici's

[8] See Hunt, "Federal Supremacy and State Anti-Subversive Legislation," 53 Michigan Law Review 407, at 422.

conclusions from that history are based solely on inference, not on any clear expression of intent. Accordingly, both the petitioner and the federal government in their briefs would make this case turn on various presumptions respecting Congressional intent.[9]

Petitioner and its supporters rely principally on a presumption of non-supersession which follows from what is stated by the Solicitor General (Brief, p. 19) as a "typical statement of the pertinent principle", quoting from *Reid* v. *Colorado*, 187 U. S. 137, at 148:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of

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[9] Petitioner and its amici now place reliance on the second sentence of Section 3231 of the Federal Criminal Code (18 U.S.C. 3231), although petitioner had not even mentioned it in the state courts until its motion for reargument in the State Supreme Court. That sentence is a general savings clause. It does not, and never has been construed as providing an exception to the general rules governing supersedure. Reliance on that provision of law actually begs the entire question before the Court on this writ. No one questions the jurisdiction of the state courts to enforce valid and operable criminal statutes, despite any provision of the Code. But the very issue here is whether the Supreme Court of Pennsylvania was right when it held that its own state law was *not* valid and operable, and any argument based on a contrary assumption is clearly fallacious.

Petitioner's interpretation of Section 3231 would mean that the states could prohibit enlistment in foreign service (18 U.S.C. 959); that the states could punish the offer of a bribe to a member of Congress, (18 U.S.C. 204); that the states could punish a federal employee who aids in prosecuting a claim against the United States (18 U.S.C. 283); that the states could punish for contempt of a Federal court (18 U.S.C. 402), or perjury before a Congressional committee (18 U.S.C. 1621); that the states could punish treason against the United States (18 U.S.C. 2381) or false use of a passport (18 U.S.C. 1543) or desertion of the mails (18 U.S.C. 1700) or the unlawful procurement of citizenship (18 U.S.C. 1421). This is not only contrary to reason, it is also contrary to the decisions of the Court in *In re Loney*, 134 U.S. 372 and *Ex parte Quarrier*, 2 W. Va. 569, to the language of the Court in *Fox* v. *Ohio*, 5 How. 410, and to the principle of *United States* v. *Christoffel*, 345 U.S. 947. In the latter case, this Court held that perjury before a Congressional committee was punishable under the provision of the Federal Code, rather than the District of Columbia Code.

> the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot* v. *Davenport*, 22 How. 227, 243."

At the outset, then, it is necessary to inquire whether this presumption and this principle is applicable to a case such as the present one, where Congress has undertaken to exercise a power delegated under the Constitution to it alone, by enacting specific legislation on a specific subject, and where the concurrent state legislation is not in a field of traditional local interest. The emphasis in the above excerpt from *Reid* v. *Colorado* on "exercise of the police powers of the States" and "exercise of a reserved power" should be noted, for, as will be seen, the state legislation here has no such foundation.

It is submitted that in a case such as the present there is no room for talk of a presumption of intent not to supersede identical state law. As will be developed in this brief, Congress, by the very fact that it has acted specifically in this particular field, has brought into operation an entirely opposite presumption; namely, that it intended its enactment to be exclusive. The burden is now on the state to show some affirmative indication, either in the legislation itself or in its history, that Congress intended to permit the states to share actual exercise of this particular federal power. This is especially true where, as here, the state and federal sovereignties are not exercising concurrent jurisdiction or powers.

Since the federal government has exercised a power which is most essential to its own sovereignty, namely, the power to provide for its own defense, we can find no help in the rules made by this Court for cases in which the federal government has merely moved into a field in which the states have traditionally exercised their police power. In the latter type of situation, state and federal jurisdictions are concurrent, and typical cases therein fall generally within two fields: first, where Congress has regulated generally, rather than specifically in the premises, and, although the legislation overlaps, local rather than federal interests are predominant (*California* v. *Zook*, 336 U.S. 725; *cf. H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525), and second, where Congress has legislated only in a portion of the field, and the question arises as to state power to regulate in other areas, not covered by Congress (*Kelly* v. *Washington*, 302 U. S. 1). Even in such situations, we note, there is much conflict in the decisions of the Court.[19]

But this is *not* a case of state and federal sovereignties exercising concurrent jurisdiction. The presumption of non-preemption cannot apply to a situation in which the federal government is acting in a field where its interest is dominant, if not indeed exclusive. "This is not a controversy between equals." Holmes, J., in *Sanitary District of Chicago* v. *United States*, 266 U. S. 405, 425. In this controversy the presumption is that Congress, by acting, has superseded the states; this is the very nature of our federal government:

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This

[19] Under the circumstances of this case, however, even if jurisdiction were concurrent, we think the rules usually applied would call for an affirmance. See this brief, *infra*, p. 39.

would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land', and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States shall take the oath of fidelity to it." (Marshall, J., in *McCulloch* v. *Maryland*, 4 Wheat. 316, 405.)

In view of the foregoing considerations, it is somewhat startling to see a department of the federal government file a brief in this Court in support of the proposition that a state government, in a field "where the national interest is obviously paramount"[11] and in respect to a problem which is admittedly "a national problem which calls for solution on a national scale",[12] in response to which the Congress has acted to make certain activities a crime, can, without clearly manifested Congressional consent, adopt that identical crime as its own and mete out its own separate and dual punishment—a punishment in addition to what the federal government has deemed adequate.

The issue here is a narrow one, albeit important. It is whether the state, consistent with the constitutional concept of federal supremacy, can enact or enforce a law making it a crime to subvert against the United States as such, in the

[11] Solicitor General's brief, p. 16.
[12] Ibid. p. 16.

face of an identical federal law on the subject and in the absence of Congressional assent thereto. The issue is *not*, as contended by petitioner and its amici, whether the state can make sedition against established government generally (if taken to include the state) or against the state government as such, a state crime. There is no contention here that this cannot be done.

The specific crime involved in this case and under which alone the issue of federal supremacy is presented is the crime of sedition "against the United States". The state statute in its application to respondent has been so construed by the Supreme Court of that state (R. 58), and such construction is, of course, binding on this Court. Accordingly, a specific intent to overthrow the federal government as such, and not the state government or organized government generally, would presumably be an element of the offense and, indeed, the proof in support of the conviction herein was directed to that end. (Opinion, Pennsylvania Supreme Court, R. 58). It was in connection with this narrow issue that the Pennsylvania Supreme Court decided as it did, and it is to that issue that the arguments in this brief are addressed.

Thus, there is no challenge to the various state laws insofar as they seek to implement any federal law on the subject, or to assist inforcement of any federal law, and there is, of course, no challenge to the powers of the state to proscribe sedition against its own government.

To summarize, it is respondent's basic position that the federal responsibility regarding the subject of sedition against the United States is such that, where the federal government has acted, the State cannot, if the principle of federal supremacy under the Constitution is to survive, make that crime one against itself unless Congress has clearly manifested its consent to the sharing of the federal jurisdiction. If presumptions are to be indulged in at all,

respondent urges that under the circumstances here present it is presumed, under the doctrine of federal supremacy, that state law on the identical subject is supplanted in the absence of clearly manifested Congressional consent to parallel state law. To these propositions we now address ourselves:

II

The Power to Suppress Sedition against the Government of the United States Cannot Be Shared by the States Once Congress Has Spoken Unless Congress Has Clearly Manifested Its Consent Thereto.

Before discussing the cases supporting respondent's position on the issue of supersession, it is necessary to explore the nature of the power which has been exercised by the federal government in enacting the Smith Act and to determine the degree of federal versus state interest in the subject of sedition against the United States. For as will be seen when the cases are discussed, these considerations are of great importance in determining the preemption issue.

A. The Source and Nature of the Power of the Federal Government to Suppress Sedition Against It Demonstrates That Power to Be One Dominantly, if Not Exclusively, Federal in Nature Rather Than One Traditionally Reserved to the States

As stated in the brief of the Solicitor General (p. 16), and as specifically noted by Congress in enacting the Internal Security Act of 1950 (Sec. 2(15); 50 U.S.C. 781 (15)), the power to suppress sedition against the United States derives both from Article I, Section 8, of the Constitution which gives Congress the power "to provide for the common defense and general welfare of the United States," and from Article IV, Section 4, thereof stating that "The

United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and . . . against domestic violence."[13]

It is further to be noted that the power "to provide for the common defense" is also one of the few powers of the federal government to be set forth in the Preamble to the Constitution. This is significant in determining the scope and high nature of that power. Although the Preamble is not a source of power for any department of the federal government, this Court has often referred to it as evidence of the origin, scope and purpose of the Constitution. "Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution and not substantively to create them." Story, "Commentaries on the Constitution," par. 462.

The power to provide for the common defense, which includes defense against sedition, is of the highest nature, and like the power to wage war and conclude peace "if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, at 318.) The fundamental nature of that power in specific reference to sedition has recently been commented upon by Justice Frankfurter, concurring in *Dennis* v. *United States*, 341 U.S. 494, at 519, as follows:

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[13] While the duty to protect the states against domestic violence is apparently conditioned "on application of the Legislature, or of the Executive (when the Legislature cannot be convened)", the formality of application of the legislature or executive, if it was ever observed (see *Luther* v. *Borden*, 7 How. 1,) has declined with the recognition in *In re Debs*, 158 U.S. 564, at 582, of the power and duty of the federal government to use "the entire strength of the nation . . . to enforce in any part of the land the full and free exercise of all national powers, and the security of all rights entrusted by the Constitution to its care". See Corwin, "The President, Office and Powers", (3rd Rev., 1948) 164-166.

". . . The right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty. 'Security' against foreign danger,' wrote Madison, 'is one of the primitive objects of civil society.' The Federalist, No. 41. The constitutional power to act upon this basic principle has been recognized by this Court at different periods and under diverse circumstances. 'To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come. . . . The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth.' . . . The most tragic experience in our history is a poignant reminder that the Nation's continued existence may be threatened from within. To protect itself from such threats, the Federal Government 'is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions.'"

It will be conceded that the interest of the federal government in suppressing sedition against it is a dominant one; as stated by the Solicitor General in his brief (p. 16) it is a subject "where the national interest is obviously paramount." And indeed, the legislative history of the Smith Act reveals that the Congress had well in mind the strong national interest in this area of criminality. See Hearings before the Senate Judiciary Committee on H.R. 5138, 76th Cong., 3rd Sess., 5-12 (1940); 86 Cong. Rec. 9031-2 (1940).

Furthermore, the problem is not a local one, suitable for local handling. The Solicitor General in his brief (p. 11) notes that it is "a national problem which calls for solution on a national scale." We suggest that the problem is not merely a national one; in many of its aspects it is international, and its connection with the field of foreign relations is close.

This has been recognized by Congress which so found in passing the Internal Security Act of 1950 (50 U.S.C. 781) and the Communist Control Act of 1954 (50 U.S.C. 841). For Congress states that the threat of sedition against which it has legislated emanates from a "world communist movement,"—a "world-wide revolutionary movement"—"a world-wide communist organization . . . controlled, directed and subject to the discipline of the Communist dictatorship of [a] foreign country." It has found that the "Communist network" in the United States is inspired and controlled in large part by foreign agents. See Sec. 2 of the Internal Security Act of 1950, 50 U.S.C. 781.

This court has similarly observed the close connection between the domestic threat of sedition and our foreign relations. See *American Communications Association* v. *Douds*, 339 U.S. 382, and especially the concurring opinion of Mr. Justice Jackson, at 422 and 427. Indeed, in enforcing the Smith Act both this court and the Court of Appeals have constantly adverted to the close connection between the sedition charge in those cases and the vast area of international politics. *Dennis* v. *United States*, in this Court at 341 U.S. 494, 511 and in the Court of Appeals at 183 F. 2d 201, 213; *United States* v. *Flynn*, 216 F. 2d 354, 367, and particularly footnote 9; cf. *Harisiades* v. *Shaughnessy*, 342 U.S. 580.

The record in this very case is full of references to international politics. See for example, the opening statement of the District Attorney (R. 154, 158, 159); the sum-

nation by the District Attorney (R. 1364, 1365, 1366, 1367, 1368, etc.) and the opinion of the trial judge (R. 37).

Thus it can hardly be denied that the control of internal subversion has been closely related to problems arising from the cold war, as it may presently and in the future be related to the spirit of Geneva. Can it really be maintained that the State of Pennsylvania or any other state, however well meaning, can be permitted to intrude in this field without Congressional assent clearly manifested?

The duty to provide for the national defense and to guide our international relations has been given, under the Constitution, to the federal government and not to the states. No other division of power is conceivable in our system of government. As will be seen this power and responsibility, once exercised, is an exclusive one which cannot be undertaken by the states unless Congress has affirmatively indicated that the states may share in their discharge.

The argument made by Pennsylvania and its supporting amici is based, in its entirety, on a contrary premise, which, we suggest, is palpably in error. This premise is that the power to suppress sedition against the United States is part of the police power of the state. Reference is repeatedly made to "The exercise of state police power." But to say that the state has traditionally undertaken to protect not only its citizens but the entire Nation from sedition directed not against the state but the United States, and that the state has traditionally exercised the right to act for the federal government in the protection of Federal interests, is absurd. We are here in a different and far higher realm than that in which state police power is customarily exercised.

Were this a case involving the control of the highways or the regulation of the color of oleomargarine or providing for the inspection of boilers on river steamers, the arguments made by petitioner and the Solicitor General might

be relevant. Every one of the many cases cited in the Solicitor General's brief at pages 18 and 19 are of this nature. In each of these, the State's exercise of its police power runs, more or less, into conflict with the exercise by Congress of its power to tax, to regulate commerce, or to carry on similar activity. Indeed, if this case were one in which the state sought to protect its citizens against breaches of the peace arising from seditious activities, whether directed against the federal or state government, the situation would be different and the cases relied on by petitioner and the Solicitor General might have application. But the Pennsylvania statute, as construed by the Supreme Court of that state, is not a breach-of-peace measure; it is one proscribing sedition against the United States as such. (R. 60-61, 64).

The protection of the citizens of a state against dangers which threaten the citizens of all states is not traditionally the subject matter of state police power. State sovereignty and jurisdiction has traditionally been deemed to exist only with respect to matters which affect the citizens of that state alone and not to matters affecting the Nation as a whole, let alone matters which are of national or even international concern. This concept of traditional state sovereignty was long ago expressed by Thomas Jefferson as follows:

> "My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty." (Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson (1829), vol. 2, p. 230, letter to Mr. Wythe.)

This Court expressed the same view in *Hines v. Davidowitz*, 312 U. S. 52, at 63, when it said:

> "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

In this context all talk of the traditional exercise of police power is meaningless.[14] We need not discuss the power of the states to act in this field in the absence of Federal statute and we shall not discuss those cases cited by the petitioner presenting that situation, since here Congress has acted. In such circumstances we submit that no power remains to the states to act, and the decisions of this Court so hold.

B. Where, as Here, the Field Is One of Dominant Federal Interest and Responsibility, and There Is No Traditional State Power to Act, an Act of Congress Must Be Deemed to Supersede Identical State Law, Unless Congress Has Affirmatively Consented to Share Its Power

Authorities are numerous for the proposition that where Congress has in fact legislated in a field in which the federal interest is dominant, and in which there is no power reserved to the states, identical state law must fall, absent a clearly expressed desire by Congress to share its responsibility, an expression nowhere to be found here. Two decisions in particular are conclusive of the issue.

[14] To argue, as the Solicitor General impliedly does, that the power to suppress sedition against the United States is one of the reserved powers of the state, is to stand history on its head. There is a great deal of historical evidence that one of the motivating factors in forming the United States was the hope that a strong central government would be better able to suppress local insurrection. We know of none indicating that the local state governments were expected to protect the central government from like danger. See for example, Starkey "A Little Rebellion" (Knopf, 1955), pp. 3, 5, 109-111, 242, 243; 28 Writings of Washington (ed. Fitzpatrick 1938) p. 124; 29 ibid p. 121, 488; 30 ibid p. 20, 62.

The first and one of the earliest—*Houston* v. *Moore*, 5 Wheat. 1, is also one of the most compelling both by reason of its close analogy factually to the present case and also because of the very relevant reasoning contained in the opinions of both the majority and dissenting justices respecting the point here at issue. In that case Congress had enacted a law, under its powers to provide for the national defense and to organize a militia, declaring that persons who fail to respond to the President's call for service in the federal militia shall be liable to certain penalties as adjudged by a court-martial convened under authority of the federal law. The State of Pennsylvania, although not making that same crime one against the state, had enacted an enabling law providing that the same penalties for the same offense could be imposed by a court-martial called under state authority. Justice Washington, speaking for the majority, declared that the Pennsylvania law was constitutional, Pennsylvania having merely attempted to assist the federal government in enforcement. Justice Story, for the dissent, would hold the state law superseded by the federal. Both agreed on the proposition that had Pennsylvania attempted to prescribe the identical offense, the state law would have to fall under the principle of federal supremacy. The reasoning of both majority and dissenting opinions in this respect are completely applicable to the present case, and because the decisions are so entirely in point, they are quoted at length.

At p. 21:

> . . . Congress has power to provide for organizing, arming, and disciplining the militia; and it is presumable, that the framers of the constitution contemplated a full exercise of all these powers. Nevertheless, if Congress had declined to exercise them, it was competent to the State governments to provide for organizing, arming, and disciplining their respective militia, in

such manner as they might think proper. But Congress has provided for all these subjects, in the way which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defense. After this, can the State governments enter upon the same ground—provide for the same objects as they may think proper, and punish in their own way violations of the laws they have so enacted? The affirmative of this question is asserted by the defendant's counsel, who, it is understood, contend, that unless such state laws are in direct contradiction to those of the United States, they are not repugnant to the Constitution of the United States.

"From this doctrine, I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet, the will of the one legislature may be in direct collision with that of the other. This will is to be discovered as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared, that the punishment for disobedience of the act of Congress, shall be a certain fine; if that provided by the State legislature for the same offense be a similar fine; with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of Congress is, nevertheless, thwarted and opposed."

At p. 23:

"If, in a specified case, the people have thought proper to bestow certain powers on Congress as the safest depositary of them, and Congress has legislated within the scope of them, the people have reason to

complain that the same powers should be exercised at the same time by the state legislature. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment for a certain offence, the presumption is, that this was deemed sufficient, and, under all circumstances the only proper one. If the other legislature imposes a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together."

At p. 24:

"Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised."

Justice Story dissenting, at p. 70:

"What, then, is the state of the case before the Court? Congress, by a law, declared that 'the officers and privates of the militia who shall, when called forth

by the President, fail to obey his orders, shall be liable to certain penalties, to be adjudged by a Court-Martial convened under its own authority. The legislature of Pennsylvania inflict the same penalties for the same disobedience, and direct these penalties to be adjudged by a State Court-Martial called exclusively under its own authority. The offense is created by a law of the United States, and is solely against their authority, and made punishable in a specific manner; the legislature of Pennsylvania, without the assent of the United States, insist upon being an auxiliary, nay, as the defendant contends, a principal, if not a paramount, sovereign, in its execution. This is the real state of the case; and it is said, without the slightest disrespect for the legislature of Pennsylvania, who in passing this act were, without question, governed by the highest motives of patriotism, public honor, and fidelity to the Union. If it has transcended its legitimate authority, it has committed an unintentional error, which it will be the first to repair, and the last to vindicate. Our duty compels us, however, to compare the legislation, and not the intention, with the standard of the constitution."

At p. 72:

"* * * If an act of Congress be the supreme law of the land, it cannot be made more binding by an affirmative re-enactment of the same act by a State legislature. The latter must be merely inoperative and void; for it seeks to give sanction to that which already possesses the highest sanction.

"What are the consequences, if the State legislation in the present case be constitutional? In the first place, if the trial in the State Court-Martial be on the merits, and end in a condemnation or acquittal, one of two things must follow, either that the United States Courts

Martial are thereby divested of their authority to try the same case, in violation of the jurisdiction confided to them by Congress; or that the delinquents are liable to be twice tried and punished for the same offense, against the manifest intent of the act of Congress, the principles of the common law, and the genius of our free government. In the next place, it is not perceived how the right of the President to pardon the offence can be effectually exerted: for if the State legislature can, as the defendant contends, by its own enactment, make it a state offence, the pardoning power of the State can alone purge away such an offence. The President has no authority to interfere in such a case. In the next place, if the State can re-enact the same penalties, it may enact penalties substantially different for the same offence, to be adjudged in its own Courts. If it possess a concurrent power of legislation, so as to make it a distinct State offence, what punishments it shall impose must depend upon its own discretion. In the exercise of that discretion, it is not liable to the control of the United States. It may enact more severe or more mild punishments than those declared by Congress. And thus an offence originally created by the laws of the United States, and growing out of their authority, may be visited with penalties utterly incompatible with the intent of the national legislature. It may be said that State legislation cannot be thus exercised, because its concurrent power must be in subordination to that of the United States. If this be true, (and it is believed to be so,) then it must be upon the ground that the offence cannot be made a distinct State offence, but is exclusively created by the laws of the United States, and is to be tried and punished as Congress has directed, and not in any other manner or to any other extent."

At p. 75:

"... But that an offence against the constitutional authority of the United States can, after the national legislature has provided for its trial and punishment, be cognizable in a State Court, in virtue of a State law creating a like offence, and defining its punishment, without the consent of Congress, I am very far from being ready to admit. It seems to me that such an exercise of State authority is completely open to the great objections which are presented in the case before us. Take the case of a capital offence, as for instance, treason against the United States: can a state legislature vest its own Courts with jurisdiction over such an offence, and punish it either capitally or otherwise? Can the national Courts be ousted of their jurisdiction by a trial of the offender in a State Court? Would an acquittal in a State Court be a good bar upon an indictment for the offence in the national Courts? Can the offender, against the letter of the constitution of the United States 'be subject for the same offence, to be twice put in jeopardy of life or limb?' These are questions which, it seems to me, are exceedingly difficult to answer in the affirmative."

To summarize: In the *Houston* case, as in the present one, (1) the federal government was acting in exercise of its constitutional power to provide for the national defense, and (2) pursuant to that power the federal government had enacted a specific criminal law establishing a specific federal offense, (not a regulation or a series of regulations).[15] All the members of the Court agreed that identical state legislation would have to be deemed superseded

[15] Petitioner and the Solicitor General make much of the fact that there is here involved a prohibition rather than a regulation. We are unable to grasp any distinction insofar as the issue of federal supremacy is concerned. Since similarity is as fatal as conflict (*Charleston &*

in the absence of affirmative consent by Congress to the sharing of its jurisdiction.

The second case which is conclusive here is that of *Hines v. Davidowitz*, 312 U.S. 52. There the validity of the Alien Registration Act of Pennsylvania (Pa. Stat. (Purdon, Supp. 1940), Title 35, Secs. 1801-6) requiring aliens to register and file certain information, was called into question. The Supreme Court found that the basic subject of the state law was identical with that of the Federal Alien Registration Act (Public Act No. 670, 76th Cong., 3d Sess., June 28, 1940, 54 Stat. 670, Ch. 439) and sustained the appellant's position that by its adoption of a comprehensive scheme for regulation of aliens, Congress precluded state action. Said the Court at p. 67:

> "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and the purpose of every act of Congress . . . In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes a l objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad

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W. & A.R. Co. v. Farmville Furniture Co., 237 U.S. 597), the fact that there is here involved but a single prohibition, duplicated exactly in both state and federal laws, would seem more readily to lend itself to a presumption of preemption or supersession than would a broad regulatory scheme where identity or conflict would not be so readily ascertainable.

base as its power to tax. And it is also of importance that this legislation deals with the rights, liberties and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans."

The subject of the legislation we are considering, namely sedition, likewise deal with those most vital and basic "rights, liberties and personal freedoms of human beings." Indeed the Court, in the *Hines* case continues as if its opinion were written expressly for the case at bar (p. 70):

> "The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject. Opposition to laws permitting invasion of the personal liberties of the law-abiding individuals, or singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country. Hostility to such legislation in America stems back to our colonial history, and champions of freedom for the individual have always vigorously opposed burdensome registration systems. The drastic requirements of the alien Acts of 1798 brought about a political upheaval in this country the repercussions from which have not even yet wholly subsided. So violent was the reaction to the 1798 laws that almost a century elapsed before a second registration act was passed."

The Acts of 1798 referred to were not only alien laws; they were also sedition acts; for the reasons cited by the Court even more than a century elapsed before the federal government adopted a second sedition act.

In enacting the legislation which we here urge as a bar to state action, Congress had in fact followed the pattern

of the Acts of 1798. For the federal statute on which respondent relies (54 Stat. 670; 76th Congress, 3rd Sess., June 28, 1940) was also an alien and sedition act. Title I of that Act, popularly known as the Smith Act, in Sections 2, 3 and 5,[16] contains the sedition provisions herein discussed; and Title III of the every same Act [17] contains the alien registration and finger-printing provisions which were held in the *Hines* case to have superseded state statutes on the same subject. Indeed, the legislative history makes clear that the same rationale, i.e., the security of our nation in a precarious and troublesome international situation, was urged by Congress as the basis for enacting both Titles I and III. It further makes clear that Congress intended to preempt the field in Title I as the court held it had preempted it by virtue of Title III. Thus, the analogy between the law involved in the *Hines* case and the law here involved is clear.

The point we are here making is summarized by the following quotation from *Hines* (p. 63):

> ". . . The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."

. . . . . .

[16] Now codified in 18 U.S.C. 2385 and 2387. Before the 1948 recodification, those sections were found in 18 U.S.C. 9-13.

[17] Codified in 8 U.S.C. 451-460.

and at p. 66:

> ". . . It cannot be doubted that both the state and the federal registration laws belong 'to that class of laws which concern the exterior relation of this whole nation with other nations and governments.' Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.' And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations."

Here, as in *Hines*, we have a subject "intimately blended and intertwined with responsibilities of the national government"; here, as in *Hines*, various aspects of civil liberties are involved; here, as in *Hines*, the subject is a national one requiring legislation on a national scale; and here, as in *Hines*, the field is one in which there is no traditional state power to act.

C. Even If the State Had Legislated in a Traditional Field and Pursuant to a Power Reserved to It, Nevertheless Where Congress Enacts Identical Legislation Pursuant to a Power Delegated to It, the State Legislation Is Superseded Unless Congress Had Manifested a Contrary Intention

It is conceded by all that the federal interest in preventing its own violent overthrow is clearly a dominant interest,

fundamental to its very existence, and we have seen that under such circumstances state legislation, which is not predicated on a power traditionally reserved to the states, must fall where Congress has acted in the premises. But even if it be assumed that the state, in proscribing sedition against the United States, was legislating in a field of traditional state power or pursuant to a power reserved to it under the Constitution, nevertheless where Congress has also constitutionally legislated on the same specific subject, the state law is superseded unless Congress has affirmatively indicated an intent to permit the concurrent legislation.

This would be true even under the extreme hypothesis that the federal interest here is not dominant but only equal to that of the states, and, of course, the rule has even stronger application where, as here the federal interest is obviously superior. *Cooley* v. *Port Wardens*, 12 How. 299, is the leading authority for the latter proposition. There, it was held that where an area of concurrent power is intertwined with national interest, exclusion of state action is justified by the mere entry of federal legislation in the field.[18]

But even if we take the former proposition and make the extreme assumption that the interests and powers of Congress and the states in the premises are equal and concurrent, nevertheless the authorities are numerous that the federal law preempts the state where a specific subject has been taken in hand by the Cogress and Congress has not indicated consent that its jurisdiction be shared. We direct

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[18] The *Cooley* doctrine continues to have force to the present day. *Cf. California* v. *Zook*, 336 U.S. 725; Hunt, "Federal Supremacy and State Anti-Subversive Legislation", 53 Michigan Law Review 407, at 416; and Grant, "The Scope and Nature of Concurrent Power", 34 Columbia Law Review 995.

the Court's attention only to the following leading cases on the subject: *Missouri P. R. Co.* v. *Porter*, 273 U. S. 341; *Charleston & W. C. R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597; *Prigg* v. *Pennsylvania*, 16 Pet. 539; *Hood* v. *DuMond*, 336 U.S. 525; *California* v. *Zook*, 336 U.S. 725.

California v. *Zook* is worthy of particular note because the dissenting opinions of Justices Frankfurter, Burton, Douglas and Jackson discuss at considerable length the doctrine here under consideration, namely, that where Congress has acted specifically in respect to a particular subject, state law on that same subject is superseded unless Congress has manifested a contrary intent. The majority holding did not dispute the doctrine; it merely found that under the circumstances of the case the doctrine had no application.[19]

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[19] The *Zook* case is entirely distinguishable from the present one, not only because of the entirely different nature of the subject matter of the concurrent legislation—regulation of the sale of transportation on state highways—but also because there was room for traditional exercise of state police power on the purely local matter of protecting its citizens on the state's own highways; an interest which the majority found to prevail over the federal interest against burdening commerce. The crux of the case was a finding by the majority that the local interest was predominant; that, of course, is not the situation here. As stated in the majority opinion,

336 U.S. at 728:

> "Certain first principles are no longer in doubt. Whether as inference from congressional silence, or as a negative implication from the grant of power itself, *when Congress has not specifically acted* we have accepted the *Cooley* case's broad delineation of the areas of state and national power over interstate commerce. *Cooley* v. *Port Wardens*, 12 How. 299; *Southern P. Co.* v. *Arizona*, 325 US 761, 768. See Ribble, *State and National Power over Commerce*, ch. 10. *Absent Congressional action*, the familiar test is that of uniformity versus locality; if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce." (Emphasis supplied).

Cf. *H. P. Hood and Sons* v. *DuMond*, 336 U.S. 525.

Justice Frankfurter stated at p. 738:

". . . One would suppose that, when Congress has proscribed defined conduct and attached specific consequences to violations of such outlawry, the States were no longer free to impose additional or different consequences by making the same misconduct also a State offense. And that is this case."

Justices Burton, Douglas and Jackson stated at p. 749:

"We start not merely with the inherent right of a state to exercise its police power over acts within its jurisdiction. We start also with the constitutional provisions by which the supreme legislative power of the respective states has been delegated to Congress to regulate interstate commerce.

"Once Congress has lawfully exercised its legislative supremacy in one of its allotted fields and has not accompanied that exercise with an indication of its consent to share it with the states, the burden of overcoming the supremacy of the federal law in that field is upon any state seeking to do so."

At Page 753:

"Where there is legislative intent to share the exclusiveness of the congressional jurisdiction, appropriate language can make that intent clear. An outstanding example of such authorization is in the Eighteenth Amendment, now repealed. It was there provided that 'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.' (US Const.) More recently, clear language was used by Congress to insure the validity of state cooperation in the 'Migratory Bird Conservation Act,' approved February 18, 1929: . . ."

At Page 757:

"It is a contradiction in terms to say that a state, without the consent of Congress, may duplicate or share in the exclusive jurisdiction of Congress. If the jurisdiction of Cogress has become exclusive, the state's jurisdiction must, by hypothesis, be derived thereafter from Congress or cease to exist. In this case there was *no express consent* by Congress to share with the states, the federally protected exclusive jurisdiction over this type of transaction in interstate commerce." (Emphasis in original).

At Page 758:

"*The precise fundamental issue is not the identity, similarity, diversity, or even repugnance, of the two statutes. The fundamental issue is that of the presence or absence of congressional consent to the sharing of its exclusive jurisdiction.*" The degree of immediate or potential conflict between the statutes has a material relation to the issue of congressional consent. Clear conflict between the statutes would be practically conclusive against the state. The less the conflict, the less obvious is the basis for the objection of Congress to sharing its jurisdiction with the state. However, even a complete absence of conflict, resulting in a mere duplication of offenses, would not remove all basis for objection and would not necessarily establish the required congressional consent. For example, the inherent objectionability of the double punishment of an offender for a single act always argues against its implied authorization. Similarly, the difficulties inherent in diverse legislative and enforcement policies always argue against the introduction of new state offenses, as distinguished from state cooperation in prosecuting

existing federal offenses. Here there was substantial potential conflict between the prescribed state penalties and the federal penalties, although the prohibited acts were the same." (Italics supplied.)

And concluding, at page 776:

"While it may be uncertain where the line of exclusive federal jurisdiction impinges upon that of the states in the absence of the exercise of federal jurisdiction by Congress, there is no doubt that, when Congress has asserted its exclusive jurisdiction, it is for Congress to indicate the extent, if any, to which a state may then share it. To whatever extent that this is not so, federal law will have lost its constitutional supremacy over state law."

D. Other Factors Indicating Preemption.

In addition to the compelling factors of paramount federal interest in respect to a problem national in scope, and the fact that Congress has expressly spoken on the subject, there are other factors here present which support the proposition that the federal enactment must be deemed to supersede the identical state law in the absence of Congressional assent to the sharing of its jurisdiction. These are as follows: (1) that the Congress has occupied the field, (2) that the state law is in conflict with the federal both as to procedures and as to penalties; and (3) that enforcement of the state laws on the subject might well operate to frustrate the accomplishment of federal objectives.

(1) *Congress Has Occupied the Field.*

One of the factors which this Court has often considered in determining whether Congress can be said to have preempted state action lies in the extent to which the federal

legislation can be considered pervasive or to have occupied the field as seen by the scope, apprehension and detail of the regulation attempted. *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148; *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605; *Hines v. Davidowitz, supra; Bethlehem Steel Co. v. N. Y. S. L. R. B.*, 330 U. S. 767; *Garner v. Teamsters Union*, 346 U. S. 485. When Congress has drafted exhaustive legislation, after hearings and careful study, prescribing the manner and scope of the control desired in a field of paramount federal interest, the presumption is strong that Congress has occupied the field to the exclusion of the states (*Hines v. Davidowitz, supra; Cooley v. Port Wardens, supra*). Such is the present situation, for it is important to note that Congress has not only enacted the Smith Act, but also the Internal Security Act of 1950[20] and the Communist Control Act of 1954.[21] In the two latter, Congress has prescribed in great detail various controls and regulations respecting the subject of subversion against the United States. The fact that Congress has undertaken such comprehensive and detailed regulation in a field in which its interest is dominant is certainly relevant to a consideration of an overall Congressional intent to supersede even though the detailed regulations were enacted subsequent to the proscription of the particular offense here involved. *Cf. United States v. Hutcheson*, 312 U. S. 219.

(2) *The State Law Conflicts With the Federal Both as to Procedures and Penalties; the Two Laws Cannot Consistently Stand Together for that Reason Alone*

One rule in the tangle of rules revolving around the pre-emption doctrine which has stood unchallenged in this Court's history is the rule that where actual conflict between the state and federal law exists, the federal must prevail

[20] 50 U.S.C. 781-844.

[21] Act of Aug. 24, 1954, c. 886, 68 Stat. 777.

(see *Sinnott v. Davenport*, 22 How. 227; *Southern Railway v. Reid*, 222 U. S. 424; *Hill v. Florida*, 325 U. S. 538). This rule is applicable even though the conflict be not in the substance of the law but rather in sanctions involved or in the procedures available. (See *Houston v. Moore*, *supra*; *Hines v. Davidowitz*, *supra*.) "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatibilities or conflicting jurisdictions as are different rules of substantive law." (*Garner v. Teamsters Union*, 346 U. S. 485, at 490.) In the present case the Congress has prescribed what punishment it deemed sufficient to act as a deterrent, and the states cannot be free to substitute their judgments on this question by posing additional or lesser penalties.

In respect to procedures, a specific conflict derives from the fact, as noted by the Pennsylvania Supreme Court in its decision below, that "indictment for sedition under the Pennsylvania statute can be initiated by an information made by a private individual. The opportunity thus present for the indulgence of personal spite or hatred or for furthering some selfish advantage or ambition need only be mentioned to be appreciated. Defense of the Nation by law, no less than by arms, should be a public and not a private undertaking" (R. 62).[22]

Thus, both in the matter of procedures and penalties, there is outright conflict between the federal and state laws. On this ground alone the two laws cannot be reconciled or consistently stand together. On its face the state law must be deemed inconsistent with the federal, providing, as it does, for different procedures and, even more important, for different penalties. *Southern Railway Co. v. R. R. Commission*, 236 U. S. 439 at 446. As stated in *Houston v. Moore*, *supra*, at 23:

[22] See 16 Purd. Penna. Stat. 3432; 4 Sadler, Criminal Procedure in Pennsylvania, par. 72-3, 2nd edition (1937).

"If the one imposes a certain punishment for a certain offence, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature imposes a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together."

(3) *Enforcement of the State Acts Might Well Frustrate the Accomplishment of Federal Purposes*

A rule closely related to the conflict rule is that where state law stands as an obstacle to the full accomplishment of federal purposes, it must be deemed superseded by the federal in the absence of a contrary indication of intent. (*Hines* v. *Davidowitz, supra;* See also *Garner* v. *Teamsters Union, supra*). While the Solicitor General in his brief (p. 30) has indicated that, up to the present time at least, enforcement by the states of their Little Smith Acts have not impeded the federal government in carrying out the policy of the federal law, that same brief (p. 46) admits the possibility of obstruction, and it is potential rather than actual obstruction which is the test. (See *Hines* v. *Davidowitz, supra; Cloverleaf Butter Co.* v. *Patterson, supra*). We have already adverted to the fact that under Pennsylvania law prosecutions can be instituted by private information. This multiplies a thousandfold the possibility of premature disclosure both of persons under federal surveillance[23] and of informers—a possibility which would

[23] Consider the following statement by J. Edgar Hoover, quoted in Lowenthal, The Federal Bureau of Investigation, p. 139 (1950).

"The Federal Bureau of Investigation has operated on the purpose that we should first find out who the spies are who are working against our national welfare, and then, carefully keeping them under scrutiny, ascertain their sources of information, the identity of their associates, their methods of communication, and finally actually taking over the supervision of the spy ring until the time comes to take them into custody. In other words, we have followed the practice of counter-espionage, namely 'spying on the spies.'"

exist even though prosecutions were possible under official authority alone. Indiscriminate or spasmodic enforcement of the state law might very well have the same effect.[24] The control of subversion being a matter of national concern, it would appear that Congress by not affirmatively indicating it desired the states to share in that control, intended that methods of control be in federal hands alone so that the efficiency of the federal measures be insured.

III

Congress Cannot Be Presumed to Have Intended to Inflict Double Punishment for a Single Crime. Such Procedure Would Raise Serious Problems under the Fifth Amendment.

To permit both state and federal laws to stand would inflict double punishment for the commission of a single offense.[25] This, of course, is not just a theoretical possibility;

[24] Address of Representative Kenneth B. Keating before the Criminal Law Section, American Bar Association, at Harvard Club, Boston, Mass., August 24, 1953:

"Our internal security as a nation is therefore the one problem which, above all others, should be left to competent professionals in the various enforcement agencies at the Federal level. It is delicate and dangerous work. It cuts closest to the rights and liberties of individual citizens, so it seems imperative that power and responsibility should be unmistakably centered in the same hands. For these reasons I have serious misgivings about some of the anti-subversive legislation that has come from various state legislatures in recent years. Of course the state authorities are eager to support this world-scale struggle. They can properly be counted on to cooperate with the national agencies. But I question whether new bodies of state law on the subject are necessary, useful, or always constructive in their operation."

[25] Not only double, but multiple punishment is possible. For instance, municipalities may well pass their own laws in this field, following the example of Detroit (Gellhorn: The States and Subversion, Cornell University Press 1952, pp. 198-206). Further, other states where an offender has never been, may well seek extradition, perhaps on the basis of circulation of literature, in an effort to inflict additional and

it has actually happened in this case.

Any presumption of non-supersedure asserted by the petitioner and the Solicitors-General, is overcome by this fact. Congress cannot be presumed to have intended such an oppressive result, which might well run into direct conflict with due process requirements, cf. *Brock* v. *North Carolina*, 344 U. S. 424. Moreover as we shall see, serious questions concerning application of the double jeopardy clause of the Constitution is raised by this conclusion.

In a free society such as ours where protection of individual liberties and freedoms is a major concern of government, it is particularly abhorrent that an individual should be subjected to double prison sentences for the commission of the same offense. Society having once exacted its penalty, that, under all principles of fairness, is enough. That is why a second punishment for the same offense is prohibited at common law [26], and that is why the prohibition against jeopardy was incorporated in the Fifth Amendment. The prevention of double punishment would seem to be a reasonable Governmental objective; to presume that Congress intended, in passing the Smith Act, to create a condition which is "something very much like oppression, if not worse" (*Houston* v. *Moore*, *supra*, at 23), in disregard of "an important aspect of civil liberties" (Frankfurter, J., in *California* v. *Zook*, *supra*, at p. 740) is hardly charitable to that body. Indeed, the law is that Congress must be presumed not to have intended the infliction of double punish-

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successive penalties which could well keep the offender imprisoned forever.

Indeed the penalty in some states is extraordinarily severe. As we have seen, Pennsylvania has a twenty year maximum penalty. The same is true of Colorado (Stat. Ann. chap 48, secs. 21-29); Delaware (Rev. Code sec. 5156); Florida (Fla. Stat. Ann. (1943) sec. 779.05); Georgia (Laws 1953, chap. 259); Iowa (Code Ann. secs. 689.4, 689.7-689.9); Kentucky (Rev. Stat. sec. 432.030); Maryland (Ann. Code of 1951, Art. 85-A, sec. 2); South Dakota (Code secs. 13.0804 and Texas (Vernon's Rev. Stat. Art. 6889-3A).

[26] *Ex parte Lang*, 18 Wall. 163, 169.

ment. (*Jerome* v. *United States*, 318 U. S. 101, at 105.) See also Burton, Douglas and Jackson, dissenting, in *California* v. *Zook*, *supra*, at p. 752: "... its [infliction of double punishment] unfairness to the individual, as well as its cumbersomeness for enforcement purposes, suggests that it should not be read into legislation in the absence of clear language demonstrating a purpose to permit it."

"Certainly strong indications of a purpose to inflict double punishment must appear before it can be assumed that Congress intended to disregard "the principles of the common law and the genius of our free government. . . ." (Story, J., in *Houston* v. *Moore*, *supra*, p. 72), or to permit a violation of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions". (Palko v. Connecticut, 302 U.S. 319, at p. 328).

Double punishment, and the due process considerations involved therein are not the only constitutional problems raised by the contentions of the petitioner. Double jeopardy, in the full constitutional sense, is likewise involved.

The petitioner argues that its prosecution of Nelson was not barred by the double jeopardy clause of the Fifth Amendment and points out that its prosecution came first (Petitioner's brief, pp. 63, 65). Petitioner is attacking a straw man. No one has ever argued that the prosecution of the respondent in the Pennsylvania courts constituted double jeopardy. Nonetheless serious double jeopardy considerations are raised by this case.

For the respondent was also prosecuted in the Federal courts and it would seem that, if the petitioner's contentions generally are correct, that respondent would have a proper plea in bar in that court. Indeed as is noted earlier, he did in fact press a plea of double jeopardy in the Smith Act proceedings.

It is elementary that the same acts may constitute a violation of both federal and state law, or indeed, of two sep-

arate state or two separate federal laws. It is equally elementary that the double jeopardy clause of the Fifth Amendment does not prevent a man from being punished several times for several separate crimes in such circumstances. Instances of this are so common that it is not necessary to cite examples.

However, we do not have here the usual situation in which a single set of acts by a defendant is claimed to constitute two separate offenses and hence to be subject to double punishment. For here there is only one offense, namely, sedition against the United States, (see discussion in this brief, infra, p. 52) and we submit, to subject a man to jeopardy twice for the *same offense* is a violation of the explicit words of the Fifth Amendment. This problem, of course, would not be raised had Pennsylvania sought to punish respondent for sedition against Pennsylvania even though the evidence might be identical with that in the Smith Act prosecution.

We are not unmindful of the language used by this court in *United States* v. *Lanza*, 260 U.S. 377, 382 which would seem to hold that the double jeopardy clause applies only where there is a second prosecution for the same offense and both by the federal sovereignty. The language used by the Court in that case was, of course, not necessary to the decision; the conclusion was required by the second section of the Eighteenth Amendment, quite regardless of the provisions of the Fifth Amendment. The language of the Court in the *Lanza* case seems contrary to the clear language of the Fifth Amendment; moreover, it certainly was not the view expressed by judges of this Court who were much closer, in point of time, to the adoption of the Constitution than was the Court in 1922.

This precise situation was considered by the Court in *Houston* v. *Moore*, *supra*. Both majority and minority in that case hypothesized the precise situation which is pre-

sented here, namely the possibility of an effort by the federal government to prosecute for an offense after the State Court had imposed its punishment. In considering the matter, Judge Washington said:

> "It was contended, that if the exercise of this jurisdiction be admitted, that the sentence of the Court would either oust the jurisdiction of the United States' Court Martial, or might subject the accused to be twice tried for the same offense. To this, I answer, that, if the jurisdiction of the two Courts be concurrent, the sentence in either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a State Court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a Circuit Court of the United States." (p. 31)

and Judge Story, in words peculiarly applicable here, said:

> "Can the national Courts be ousted of their jurisdiction by a trial of the offender in a State Court? Would an acquittal in a state court be a good bar upon an indictment for the offense in the national courts? Can the offender, against the letter of the constitution of the United States 'be subject for the same offense, to be twice put in jeopardy of life or limb?' These are questions which, it seems to me, are exceedingly difficult to answer in the affirmative." (p. 75)

We do not argue that a plea of double jeopardy would serve as a defense in this action since, as the petitioner has pointed out, it got there first. But if we are correct it would give respondent a valid defense to the federal court prosecution, so that, in effect, the prior state prosecution would have served to oust the federal court of its ability to try the respondent.

This situation we submit is manifestly absurd and cannot conceivably have been the intent of Congress. It would mean that any county prosecutor, either intentionally or unintentionally, could thwart the enforcement of the Smith Act by hastily prosecuting a defendant under the state sedition statutes, thus providing him with virtual immunity from a Smith Act prosecution. Such a procedure would be serious enough if the defendant in such a proceeding were convicted; it would be even more serious if he were acquitted, since he would then go free of any punishment for his crime.

This is not an idle hypothesis. Indeed that result may very well eventuate in this case. Regardless of how this Court may decide the issues in this appeal, it is almost inconceivable that the state court conviction against Nelson will stand, in view of the many additional errors which are saved by this record and which will have to be considered by the Pennsylvania Court, should this Court reverse. In the meantime it may be that respondent's plea of double jeopardy, urged in the Smith Act proceeding, will bar prosecution under that Act. Such an outcome of this proceeding is, we respectfully suggest, completely inconsistent with the intent of Congress.

IV

Petitioner's Argument That the Same Crime Offends Both State and Federal Sovereignties, and That the States' Interest in the Subject Warrants Making a Federal Crime Its Own, Forgets the Separate Nature and the Separate Jurisdiction of the Two Sovereignties under the Constitution.

Petitioner and those filing briefs amici in support of it argue that the crime of sedition against the United States at the same time constitutes a crime against the state; that

the state has an equal and concurrent interest with the United States in guarding against sedition directed at the federal government; and that since the same acts or activities of subversion can offend against both state and federal sovereignties, the state can make the federal crime its own and inflict its own penalties.

A. Acts of Sedition Against the United States Are Not Ipso Facto Acts of Sedition Against the States Even Though the States May Have a Deep Interest in the Subject

In answering this argument, it must again be recalled that we are here dealing with the specific crime of sedition against the United States and not against the State of Pennsylvania. The essence of the crime, therefore, is subversion against the federal government as such, rather than against the government of any state as such. To say that acts of sedition against the federal government are *ipso facto* acts of sedition against the state government forgets the different sovereignties of the two governments, each operating within its constitutionally different sphere of jurisdiction and each possessing different political capacities. To constitute sedition against the state as such it is not enough to engage in sedition against the United States generally, but it must be done directly against the state in particular as by subverting her government and laws.

Treason against the United States is a crime similar to that of sedition against the United States. The concern and interest of the states to provide against it are at least as strong as that asserted here by the states in support of the states' sedition laws. The crime of treason against the United States has been held punishable only by the federal and not by the state government in the absence of evidence

that the acts of treason were carried on directly against the state—evidence entirely lacking in this case.

Ex parte Quarrier, 2 W. Va. 569, involved a case in which a lawyer, a former member of the Confederate Army, sought admission to practice in West Virginia even though he had confessed treason against the United States. In holding that the state could not attempt to adopt or punish for the crime of treason against the United States, the Court stated at p. 571:

> "Indeed, it must not be forgotten that in this case no treason against the State of West Virginia, whose courts are convoked to consider the subject, has been either proved or confessed, and the only acts stated that could amount to the crime of treason were perpetrated against the United States, and for which the party has been pardoned by that government. Now it would be straining the point too far to hold, as contended for, that the war being waged against the United States, of which the State of West Virginia is one, was, therefore, waged against her in the sense contemplated in the statute against treason, and that, therefore, the acts in question were treason against the State and felony within the statute. . . . For while it is not intended to deny that the same act might constitute treason against the United States and also against the State, and the traitor be held responsible to each for his treason respectively; *yet to constitute treason against the State, it is not enough to wage war against the United States generally or collectively, or as component parts of the national Union, but it must be done directly against the State, in particular, by invading her territory, attacking her citizens, subverting her government and laws, or attempting her destruction by force, etc.* . . ." (Emphasis supplied.)

In *People v. Lynch*, 11 Johns. 549, the defendant was indicted for treason against the state of New York for the act of supplying provisions to a British ship of war during the war between the United States and Great Britain. In dismissing the indictment, the Court held, at 552:

> "And it has been said, that this act [the state act against treason] is nugatory, unless it applies to cases like the present; but this by no means follows, for there can be no doubt but such a state of things might exist, as that treason against the people of this state might be committed. This might be, by an open and armed opposition to the laws of the state, or a combination and forcible intent to over-turn or usurp the government. And, indeed, the state, in its political capacity, may, under certain special circumstances, pointed out by the constitution of the United States, be engaged in war with a foreign enemy. But no such circumstances are stated in this indictment. Great Britain cannot be said to be at war with the State of New York, in its aggregate and political capacity, as an independent government, and, therefore, not an enemy of the state, within the sense and meaning of the statute. The people of this state, as citizens of the United States, are at war with Great Britain in consequence of the declaration of war by congress. The state, in its political capacity, is not at war.
>
> ". . . We think the jurisdiction of the state courts does not extend to the offense of treason against the United States."

It is immaterial that subversion against the United States will vitally affect the state and may bring injury to it. Hostile activities of a foreign nation directed against the United States may well threaten and imperil the lives and property of the citizens of the several states, but no state

could claim that this would authorize the state either to declare war against that hostile power or to pass other legislation designed to combat such threats. The states have an interest, and often a very deep interest, in the operation and enforcement of many federal laws; yet it has never been suggested that the state may, for instance, pass a law making it a state crime for an individual to fail to pay a federal income tax. The states have a deep and what was claimed to be an equal interest in a requirement that the citizens of the country respond to the President's call for duty in the federal army. Yet, as held in *Houston* v. *Moore*, *supra*, such an interest could not supplant the requirements of federal supremacy. Similarly, the state may well have an equal interest in regulating unions to the end that Communist influence there is at a minimum. Yet it is clear that state regulation in that field would fall. *Hill* v. *Florida*, 325 U. S. 538; *Weber* v. *Anheuser-Busch*, 348 U. S. 468; *General Drivers Union* v. *The American Tobacco Co.*, 348 U. S. 978. And to give a final example, it might greatly assist the state in combatting subversion to limit the use of the mails by known Communists, yet that, too, would have to be considered invalid. (See 53 Michigan Law Review, *supra*, at 437).

We would suppose that every crime against the United States would threaten injury to the state, or to the lives and property of its citizens. But the state and federal governments are separate sovereignties; the states have their own separate governments against which subversion may be directed, and to prevent which the states may pass laws. No doubt the states may pass laws which will operate to assist in the enforcement of the federal law or will assist in the apprehension of those who seek to violate the federal law, and the states may, of course, pass laws designed to protect their citizens from breaches of the peace which may result from acts of subversion against the federal government. But the enactment of such laws is an entirely

different thing from the state making the federal law its own.

Under the Constitution the federal government, and not the states, has been entrusted with the responsibility of guarding against subversion which is directed against the federal government. As a political entity the federal government has its own responsibilities which are separate and apart from responsibilities with which the states are, in turn, primarily concerned. As to those interests which are federal, no matter how much they might concern the States, the states relinquished control when they adopted the Constitution.

> ". . . But when the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the States ceased to extend." *(Tennessee* v. *Davis*, 100 U.S. 257, at 266.)

And in *McCulloch* v. *The State of Maryland, et al.*, 4 Wheat. 316, 429 it was stated:

> "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them."

No one would assert that, in passing laws making it a state crime to engage in subversion against the United

States, the states were not "governed by the highest motives of patriotism, public honor and fidelity to the Union." *Houston* v. *Moore*, *supra*, at 71. But state interests however vital, state motives however praiseworthy, cannot confer jurisdiction in the state sovereignty that the Constitution has imposed in the federal. Any other rule would negate the entire principle of federalism, and federal law would have lost its constitutional supremacy over state law.

B. The Principal that the Same Activities May Violate Both State and Federal Law Is Applicable Only When Both Sovereignties Have Jurisdiction Over the Activities, and When the State and Federal Law Occupy Different Planes so that Two Separate Crimes Are Committed

Petitioner and its supporting amici rely heavily upon the argument that the same activities may offend both state and federal law—an argument closely related to the contention that sedition against the United States is *ipso facto* sedition against Pennsylvania, discussed above. Here again, the argument forgets the separate natures of the federal and state governments, the separate responsibilities entrusted to each under the Constitution, and the separate jurisdictions to discharge these responsibilities. We have argued, above that certain powers and functions of the federal government, when actually exercised by that government in respect to a particular subject, become exclusive. The principle relied on by the states, to the effect that the same act may constitute a crime against both state and federal governments, can have application only when the activities involve some aspect of federal and state responsibility over which each has its respective jurisdiction, that is, when two different planes of jurisdiction are involved, the one a federal and the other a state, so that the same activities constitute two separate crimes, not, as here, a single crime.

The applicable law in this connection is set forth by this Court in *Southern Railway Co. v. Railroad Commission*, 236 U. S. 439. There, the Court stated at 446, 448:

"*But the principle that the offender may, for one act, be prosecuted in two jurisdictions has no application where one of the governments has exclusive jurisdiction of the subject-matter and therefore the exclusive power to punish.* Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employes. Until Congress entered that field the States could legislate as to equipment in such manner as to incidentally affect without burdening interstate commerce. But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that when exercised it is exclusive, and *ipso facto*, supersedes existing state legislation on the same subject. Congress of course could have 'circumscribed its regulations' so as to occupy a limited field. Savage v. Jones, 225 U.S. 501, 533; Atlantic Coast Line R. Co. v. Georgia, 234 U.S. 280, 293. But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employes. *The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties.*

"*The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control.*" (Emphasis added.)

Examples of such different planes of federal and state jurisdiction, but involving identical acts, have been given by Justice Frankfurter in his dissent in *California* v. *Zook*, *supra*, 336 U.S. at 740:

> "Of course the same physical act may offend a State policy and another policy of the United States. Assaulting a United States marshal would offend a State's policy against street brawls, but it may also be an obstruction to the administration of federal law. Scores of such instances, inevitable in a federal government, will readily suggest themselves. That was the kind of a situation presented by United States v. Marigold, 9 How. 560. Passing counterfeit currency may, in one aspect, be '*a private cheat* practiced by one citizen of Ohio upon another,' and therefore invoke a State's concern in 'protecting her citizens against frauds,' 9 How. 568, 569, but the same passing becomes of vital concern to the Federal Government because it tends to debase the currency."

And in *In re Heff*, 197 U.S. 488, this Court said at p. 507:

> "It is true, the same act may often be a violation of both the State and Federal law, but it is only when those laws occupy different planes. Thus, a sale of liquor may be a violation of both the state and Federal law, in that it was made by one who had not paid the revenue tax and received from the United States a license to sell, and also had not complied with the state law in reference to the matter of State license. But in

that case the two laws occupy different planes, one that of revenue and the other that of police regulation. There is no suggestion in the present case of a violation of the internal revenue law of the Nation, but the conviction is sought to be upheld under the act of 1897, a mere statute of police regulation."

That the state law here would operate on the same plane as the Smith Act is in effect admitted by the petitioner. Indeed, one of the principal arguments set forth in the dissenting opinion of Justice Bell below is to the effect that, since the federal government has demonstrated an ineptness in the handling of this problem, it is necessary for the state to step in and fill the breach (R. 73). (The factual inaccuracy of this argument is discussed below, p. 65.)

Petitioner and its supporters place great reliance on the decisions of this Court in *Gilbert* v. *Minnesota*, 254 U.S. 325, *Gitlow* v. *New York*, 268 U.S. 652 and *Whitney* v. *California*, 274 U.S. 357.

The *Gilbert* case upheld a state statute making it a crime to discourage enrollment in the United States Army. That statute was construed as having for its purpose the prevention of breaches of the peace—a construction which cannot be placed upon the Pennsylvania act in this case, not only because of the express language of that act and the extreme penalty involved, but because the Pennsylvania Supreme Court has held differently. Indeed, there is evidence in the record of the *Gilbert* case that an actual breach of the peace had occurred or was imminent at the time of the events which led to the indictment there, a circumstance not present at all in this case.

Furthermore, the majority of the court in the *Gilbert* case neither distinguished nor even discussed *Hopstaff* v. *Moore*, *supra*, nor the doctrine of the *Cooley* case, *supra*. It is worthy of note that Justice Brandeis, unwilling to agree that the purpose of the act was to prevent disorder,

was of the opinion that legislation must fall as being within the exclusive competency of Congress. He said (at p. 341):

> "... As exclusive power over enlistments in the Army and the Navy of the United States and the responsibility for the conduct of war are vested by the Federal Constitution in Congress, legislation by a State on this subject is necessarily void unless authorized by Congress. . . The exclusiveness of the power of the Federal Government with which this state legislation interferes springs from the very roots of political sovereignty."

Cf. *Ex Parte Meckel*, 87 Okla. Crim. 120, 220 S.W. 81.

The *Whitney* and *Gitlow* cases are distinguishable on two grounds. In the first place, the argument that the state statute was rendered inoperable by the superseding effect of the federal statute was not discussed by the Court nor presented by counsel in either of the cases. In the second place, the state statutes there did not even purport to prohibit sedition against the United States. They were typical criminal anarchy statutes; they were aimed at advocacy of the doctrine that organized government was an evil and could properly be overthrown by force and violence. There was no charge that the government of the United States specifically was the target of the conduct of the defendants there.

V

Practical Considerations Negative Congressional Intent to Permit the States to Share Its Jurisdiction

Petitioner and the amici briefs filed in support of petitioner assert vehemently that Congress could not be presumed to intend to overthrow the multitude of state laws

on the subject and thus leave the states helpless to defend themselves and the Nation bereft of that added protection.

A short answer to this contention is that mere volume of such law cannot afford excuse for ignoring constitutional mandates. Under this Court's ruling in the *Hines* case, *supra*, the alien registration laws of some nineteen states were superseded, and yet this did not deter this Court from affirming federal sovereignty. Alien registration, it is to be recalled (*supra*, p. 36), is in the same general field as subversion. Further, in this case, as in that one, if it can be said that Congress knew of the existence of many state laws on the subject when it passed the legislation in question, it can also and with perhaps even greater force be said that it knew of the primary national concern in the subject matter of the legislation and the need for unified national control.

But there are other more fundamental answers to the overall arguments of petitioner in this respect. While, as we have seen, the very fact that Congress has acted is indicative of an intent that state laws be superseded, there are practical considerations which strongly support the assumption that the Congress meant the federal law to have exclusive application, and which indicate that the states, even without their Little Smith Acts, would be neither so helpless nor the Nation left so unprotected as is imagined.

To begin with, it should be noted that were the decision of the Supreme Court of Pennsylvania to be upheld in the present case, supersession would be effected in only a very narrow area, namely, in respect to acts of sedition against the United States Government as such. Other state laws and regulations touching on the subject of subversion would remain. Thus, the state will, of course, remain free to protect in any manner it sees fit against subversion against the state government, and there will remain unchallenged (at least by any ruling in this case) laws pro-

scribing qualifications for teaching, for public employment, and for public office, as well as laws which withhold various state benefits from persons engaging in subversive activity. (See Note, 55 Columbia Law Rev. 83, at 92, and Note, 66 Harvard Law Rev. 327, at 328.) Further, state legislation which seeks to assist in the enforcement of the Smith Act, or to assist in the apprehension of possible violators, is entirely proper (*Houston* v. *Moore*, *supra*).[27] Also, states may enact whatever laws are deemed suitable for the purpose of cooperating with federal agencies having the duty of enforcing the Smith Act. See e.g., Michigan Statutes, par. 28.243 (Sup. 1951).[28] Finally, as noted by the Supreme Court of Pennsylvania below (R. 58), "There are many valid laws on the books of the state for coping effectively with actual or threatened internal civil disturbances."[29]

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[27] As stated in the dissenting opinion of Justices Burton, Douglas and Jackson in *California* v. *Zook*, *supra*, p. 754 f.n. 14:

"The constitutional principle of the supremacy of federal jurisdiction here discussed puts a limitation upon the legislative jurisdiction of the states in the absence of congressional consent. It does not restrict cooperation of the states in the enforcement of federal statutes. Such cooperation, for example, is an appropriate accompaniment of the National Transportation Policy under the Interstate Commerce Act. This cooperation does not, however, require the creation of separate state offenses paralleling or nearly paralleling the federal offenses. It calls, rather, for cooperation in enforcing the existing federal offenses."

[28] As noted in f.n. 71, 66 Harvard Law Review, 327, at 334:

"The Eastern Region of the Association of Attorneys General has asked its national Association to investigate the desirability of a uniform subversive activities statute to implement federal legislation. The resolution also suggested that a procedure be established for the reciprocal exchange of information regarding subversive activities among the states and federal agencies. Letter from John W. Nassikas, Assistant Attorney General of New Hampshire, Sept. 24, 1952".

[29] Title 18 of Purdon's Code provides penalties for riots and unlawful assemblies (sec. 4401); riotous destruction of property (sec. 4402); disturbing public assemblies (sec. 4405); carrying deadly weapons (sec.

Moreover, it cannot be assumed that federal enforcement of the Smith Act would be either dilatory or ineffective; on the contrary, it must be presumed that the existence of an intense federal interest in preventing subversion, as manifested, for instance, in the legislative history of the Smith Act (see hearings before the Senate Judiciary Committee on H.R. 5138, 76th Cong., 3rd Sess., May 12, 1940; 86 Cong. Rec. 9031-32 [1940]) will result in strict federal enforcement. The Annual Reports of the Attorney General (see, for instance, Report of Attorney General, 1952, pp. 9-10) and of the Federal Bureau of Investigation, as well as of the record of prosecutions under the Smith Act, speaks strongly that the Nation can cope with the threat of sedition against the United States without the necessity for parallel state laws on that subject.

It cannot be gainsaid that the federal government has the better facilities for investigating and prosecuting subversion, and has demonstrated its capacity and intent to deal with a world-wide conspiracy. If, as asserted, it cannot be assumed that Congress would want to deprive the states of their Little Smith Acts, with even less right can it be assumed that Congress would inadequately or inefficiently enforce its own law so as to require supplemental state legislation.

There are two other considerations which might well have motivated Congress not to share its jurisdiction with the states. The first is that guarding against the broad threat of subversion against the United States as a nation is a problem which should be left to competent professionals in the various enforcement agencies at the federal level. Since the apprehension and prosecution of those who would subvert against the federal government is extremely delicate

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4416); carrying bombs and explosives (sec. 4417); regulating use of firearms (sec. 4628). Article IX is headed "Offenses against Real Property and Malicious Mischief" and contains many relevant provisions.

work and cuts close to the rights and liberties of individual citizens, it may well have seemed imperative that power and responsibility should be centered in the same hands.[30]

A second consideration which might well have been in the mind of Congress relates to the practical consequences in the field of civil liberties of permitting a dual system of ferreting out and punishing sedition. It is notorious, in these difficult times, that many of the greatest outrages upon the civil liberties of persons suspected of "subversive" activities have been perpetrated at the hands of some of the same state governments. A prime illustration can be found in the state court proceedings in this very case. Similar disregard for the elementary principles of due process can be found in the prosecution of Carl Braden and others in Kentucky,[31] the indictment of Dirk Struik and others in Massachusetts,[32] the imprisonment of fourteen witnesses

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[30] In May of 1954, J. Edgar Hoover stated in an interview, reported in the New York Times (New York Times, May 11, 1954):

> "The F.B.I. is the country's first defense against espionage and subversion. If we fail, the security of this country will be shaken. But we won't fail. . . .
>
> "Investigating subversives is a highly professional job. The F.B.I. is the agency to which people who have any information along this line should turn. In World War I, I saw abuses from well-meaning people and the development of a vigilante attitude.
>
> "Then in World War II, I was approached by groups who wanted to help investigate. They wanted badges and authority to make investigations of their own. I flatly refused. I knew the work had to be handled by professionals. I knew the only sound way to deal with the problem was through constituted law enforcement agencies. I told them to turn their information over to the F.B.I.—not to investigate, themselves."

[31] *Commonwealth* v. *Braden*, Jefferson County, No. 101,692. An appeal from a conviction and a sentence of fifteen years is pending in the Kentucky Court of Appeals. See Millis: "Louisville Braden case, A Test of Basic Rights," 180 The Nation 393 (May 7, 1955).

[32] *Commonwealth* v. *Struik*, Middlesex County, Criminal No. 40725, 40726 and 40727, and *Commonwealth* v. *Hood, et al.*, Suffolk County No. 2457.

before a Dade County Grand Jury in Florida, [33] and similar prosecutions or threats of prosecution elsewhere. Not only states but even cities have joined in the "red hunt". As might be expected, in many of these situations local political situations seem to have played a preeminent role. [34]

We can perhaps best close the discussion of this aspect of the issue by reference to the remarks of George F. Kennan, concerning whom a Justice of this Court has said "no one is better equipped . . . to speak on the meaning of Communism and the spirit in which we should meet it." [35] Mr. Kennan, writing for the New York Times Magazine of May 27, 1951, pp. 7, 53, 55, said:

> "If our handling of the problem of Communist influence in our midst is not carefully moderated—if we permit it, that is, to become an emotional preoccupation and to blind us to the more important positive tasks before us—we can do a damage to our national purpose beyond comparison greater than anything that threatens us today from the Communist side. The American Communist party is today, by and large, an external danger. It represents a tiny minority in our country; it has no real contact with the feelings of the mass of our people; and its position as the agency of a hostile

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[33] *State ex rel Feldman* v. *Kelly*, 76 So. 2d 796.

[34] The literature on this subject is extensive. See, for example, Gellhorn, "The States and Subversion" (1952); Chafee, "Free Speech in the United States" (1940); Prendergast, "State Legislature and Communism"; "The Current Scene", 44 Am. Pol. Sci. Rev. 556 (1950); Note, "Effectiveness of State Anti-Subversive Legislation", 28 Ind. Law Journal 492 (1953); Hunt, "Federal Supremacy and State Anti-Subversive Legislation", 53 Michigan Law Review 407 (1955); et. O'Brian, "Civil Liberty in War Time", Report of the New York State Bar Ass'n, Vol. 42, reprinted as S. Doc. 434, 85th Cong., 2d sess., pp. 12-15.

We understand that a brief amicus curiae will be filed by Philip Feldman, et al., in this case, which will discuss some of these situations in detail.

[35] Mr. Justice Frankfurter in *Dennis* v. *United States*, 341 U.S. 494 at 554.

foreign power is clearly recognized by the overwhelming mass of our citizens.

"But the subjective emotional stresses and temptations to which we are exposed in our attempt to deal with this domestic problem are not an external danger; they represent a danger within ourselves—a danger that something may occur in our own minds and souls which will make us no longer like the persons by whose efforts this republic was founded and held together, but rather like the representatives of that very power we are trying to combat: intolerant, secretive, suspicious, cruel, and terrified of internal dissension because we have lost our own belief in ourselves and in the power of our ideals. The worst thing that our Communists could do to us, and the thing we have most to fear from their activities, is that we should become like them.

"That our country is beset with external dangers I readily concede. But these dangers, at their worst, are ones of physical destruction, of the disruption of our world security, of expense and inconvenience and sacrifice. These are serious, and sometimes terrible things, but they are all things that we can take and still remain Americans.

"The internal danger is of a different order. America is not just territory and people. There is lots of territory elsewhere, and there are lots of people; but it does not add up to America. America is something in our minds and our habits of outlook which causes us to believe in certain things and to behave in certain ways, and by which, in its totality, we hold ourselves distinguished from others. If that once goes there will be no America to defend. And that can go too easily if we yield to the primitive human instinct to escape from our frustrations into the realms of mass emotion

and hatred and to find scapegoats for our difficulties in individual fellow-citizens who are, or have at one time been, disoriented or confused."

PART TWO

I.

Introduction

As the record herein shows, many grounds for reversal were urged by the respondent to the Pennsylvania Courts. Some of them involved simple error by the trial court, but most raised constitutional points affecting the validity of the state statute as interpreted and applied to Nelson, the fairness of the trial afforded him, the denial to him of counsel and similar matters. Most of these issues are not being presented before this court at this time because it would seem more orderly that they be considered by the Pennsylvania Court before any consideration here.

However, this court has, as a matter of policy, searched the record in cases properly before it and it will affirm the decision below if that decision is correct, even though this court may disagree with the reasons given below, provided of course that a proper federal issue is presented. *Lagnes* v. *Green*, 282 U. S. 531, 536; *United States* v. *Curtiss-Wright*, 299 U. S. 304; *Riley* v. *Commissioner of Internal Revenue*, 311 U. S. 55, 59; *United States* v. *American Ry Express*, 265 U. S. 425, 435; *Stelos Co.* v. *Hosiery Motor-Mead Corp.*, 295 U. S. 237, *Helvering* v. *Gowran*, 302 U. S. 238.

Accordingly, we are presenting for this court consideration of the validity of the indictment because it seems that the indictment is so bad on its face that it must be dismissed regardless of any other issues.[36] Consideration by the

[36] There is actually another contention which the petitioner might appropriately make at this point, and that is the insufficiency of the

court of this issue at this time may perhaps save a good deal of inconvenience later.

II

The Indictment Is Constitutionally Invalid

(A) The Indictment Is Vague and Uncertain

The indictment (R. 9-20) is in twelve paragraphs, each of which was treated by both the prosecution and the defense alike as a separate count. Each count of the indictment is invalid for vagueness and uncertainty. Not a single count makes even an effort to inform the defendant, with reasonable clarity, of the nature of the charges against him. Conviction under any of the counts would deprive the defendant of his liberty without due process of law in violation of the Fourteenth Amendment.

The constitutional requirements of an indictment have been frequently stated by this Court. The leading case is *United States* v. *Cruikshank*, 92 U. S. 542. There this Court said at page 558:

> ". . . The object of the indictment is, first, to furnish the accused with such a description of the charge

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evidence to support a conviction. We are aware that this court is reluctant to consider evidentiary points until the State Court has passed upon them and therefore we are not considering the matter *in extenso*. However, it might be noted that of the six witnesses who testified on behalf of the Commonwealth, only one Cvetic testified as to the activities of Nelson within the period of the statute of limitations. Cvetic's testimony is quite short and appears at pages R. 694-716 with redirect at 855-862. The whole testimony concerning Nelson consists of a few casual conversations he had with Nelson (R. 707, 708, 709, 711), together with a description of Nelson's alleged duties as an officer of the Communist Party. There was no evidence of violence; no evidence that Nelson ever sold or distributed Communist Party Literature and, except for conversations, no evidence that Nelson ever did anything personally. The theory of the case apparently was that Nelson could be held vicariously for the alleged unlawful doctrine of the party. As to the reliability of Cvetic as a witness, see appendix to the petition for certiorari in *Mesarosh* v. *United States* now pending in this court.

against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

See also *Hodgson* v. *Vermont*, 168 U. S. 262, 269; *Hagner* v. *United States*, 285 U.S. 427, 431.

Here none of the requirements of due process are met. The first count may be taken as illustrative. It alleges that the defendant

> "on the 19th day of July [1950] . . . and on divers days and times prior thereto, at the County aforesaid, and within the jurisdiction of this Court, unlawfully and feloniously did then and there encourage divers persons, whose name and names are to this Inquest unknown, to take certain measures and engage in certain conduct with a view of overthrowing and destroying by force and by a show and threat of force, the Government of this State and of the United States of America, contrary to the form of the Act of the General Assembly. . . ." (R. 9)

The second count of the indictment is no better. It alleges that the defendant

> "on the day and year aforesaid at the County aforesaid and within the jurisdiction of this Court unlawfully and feloniously did incite and encourage a certain person and persons whose name and names are to this Inquest unknown to commit an overt act and

overt acts with a view to bringing the Government of this State and of the United States of America into hatred and contempt; contrary to the form of the act of the General Assembly . . ." (R. 9, 10).

These two counts are typical. In no one of the twelve counts are any acts described or conduct specified. No dates, persons or places are alleged. The defendant is left to conjecture what actions of his, over the two year period of the statute of limitations, might possibly fall within the indictment and be raised at the trial. This clearly cannot meet the constitutional requirement of due process.

It is clear from the form of the indictment that the Grand Jury merely repeated, in most cases, the general language of the statute. Such form of allegation is insufficient. We again refer to the opinion of this court in *United States* v. *Cruikshank*, supra, at p. 558:

". . . where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, — it must descend to particulars.' "

See also *United States* v. *Hess*, 124 U. S. 483, 487.

It is clear of course that the vagueness here found is not inherent in a prosecution for sedition nor is such lack of particularity even customary. As an illustration of the particularity with which an indictment in a sedition case may be drawn, see the indictment in *United States* v. *Dennis*, 341 U. S. 494. The contrast speaks for itself.

(B) Many of the Counts of the Indictment Fail to Allege Intent.

Many of the counts are not only uncertain; they even fail to allege all the statutory elements of the crime. Moreover,

the element omitted is that of intent, required alike by the Pennsylvania Sedition Statute and by the Constitution of the United States.

Count I may be taken as illustrative. It alleges that the respondent encouraged others to engage in conduct with the view of overthrowing the government by force and violence. We assume that this is intended to allege a violation of subsection (b) of the statute which provides that conduct, *the intent of which* is to encourage any person to take measures or to engage in conduct with a view of overthrowing or attempting to overthrow the government by force, shall constitute sedition. Thus the indictment omits the critical allegation of intent.

That an allegation of intent is required is so evident that extensive argument is unnecessary.[37] Aside from the general rule that an indictment must allege all the elements of the crime charged (*United States* v. *Standard Brewery*, 251 U. S. 210) omission of an allegation of intent in this context raises critical constitutional law questions under the First and Fourteenth Amendments.

See *Dennis* vs. *United States*, 341 U. S. 494, 500; *Hartzel vs. United States*, 322 U. S. 680; *Screws* vs. *United States*, 325 U. S. 91, 101; *Morissette* vs. *United States*, 342 U. S. 246.

Indeed, if sedition laws are to be enforced at all, it is clear that criminal intent is often the principal distinction between lawful and unlawful conduct. Otherwise, every library would be guilty of the distribution of seditious books; every university economics instructor would run the risk of a charge of sedition when he discussed the doctrine of Karl Marx; every parlor discussion of Communism would turn into a conspiracy to commit sedition. Clearly this re-

[37] Intent may perhaps be alleged by the use of words such as "wilfully" or "knowingly". See *Dennis* v. *United States*, *supra*, at 499. But this indictment alleges only the legal conclusion that respondent acted "unlawfully" and "feloniously" certainly no substitute for an allegation of intent.

sult is prohibited by the First Amendment and this court made that perfectly clear in the *Dennis* case, as did the Court of Appeals (*U. S.* v. *Dennis*, 183 F. 2d 201).

Whatever respondent is alleged to have done may not have been intended to encourage anyone to engage in unlawful conduct. He may, so far as the indictment is concerned, have unwittingly encouraged unlawful conduct, as, for example, a bank may encourage thieves by failing to post proper guards. Absent intent, there can be no such crime as sedition.

Other counts likewise fail to allege any intent. See, for example, Counts II, III, IV, X, XI, and XII. Under many of these counts any bookseller, or the Carnegie Library in Pittsburgh would be guilty under the indictment (R. 1135-1139).

(C) Many of Counts of the Indictment Allege Only that Respondent Held the Government up to Hatred and Contempt

An equally serious defect appears in many of the counts—a defect arising from the statute, which defines sedition, *inter alia*, as

> "any writing . . . utterance or conduct . . . the intent of which is:
>
> . . . . . .
>
> (c) to incite or encourage any person to commit any overt act with a view to bringing the government of this state or of the United States into hatred and contempt."

This is a seditious libel statute. It may find justification only in political and legal theories fundamentally inconsistent with the First Amendment and which would reintroduce into our law all of the evils which the First Amend

ment was framed to eliminate. The 17th Century common law of seditious libel is based upon the theory that political institutions have an entrenched sanctity and that any criticism would tend to a breach of the peace. Our government is based on a contrary premise, and certainly the Revolutionary leaders who overthrew, not only the foreign government of Great Britain, but the domestic government created by the Article of Confederation, could not have believed the suggestion of Lord Coke that it is a greater offense to censure public men than private men, since censure of the former would tend to make the government unstable.[38]

In the decades preceding the adoption of the First Amendment the weapon of seditious libel was the basic means of suppressing the advocacy of political change both in this country and in England. The seditious libel cases had a sharp impact upon American views of freedom of speech and the press. The writing of Wilkes and Junius were well-known in the colonies, and the seditious libel cases arising from them were popular American causes. These writings coincided in large part with the views of the colonists, denouncing the Parliamentary system and insisting upon the rights of the people as against government. The Wilkes prosecution for seditious libel (19 How. St. Tr. 1385) which resulted from the attack launched by issue No. 45 of the North Briton upon the ministry in 1763, was before the public for six years and became a symbol

[38] *De Libellis Famosis*, 3 Coke's Rep. 254 (1605). On the "unconstitutional" overthrow of the Articles of Confederation, see S. E. Morrison & H. S. Commager, The Growth of the American Republic (1930) 162; C. A. & M. R. Beard, The Rise of American Civilization (1930), 328-329; Herbert M. Morais, The Struggle for American Freedom: The First 200 Years (1944) 253; J. P. & R. E. Nichols, The Growth of American Democracy (1939) 97; 1 Burgess, Political Science and Comparative Constitutional Law (1890-1891) 105; Van Doren, The Great Reversal (1948) 31.

of democratic opposition to tyranny on both sides of the Atlantic.[39]

The history of the adoption of the first ten amendments to the Constitution and the events during the following ten years, which saw the enactment of the Alien and Sedition Laws of 1798, make it clear that the colonists were repudiating the doctrine of seditious libel (See Chafee, supra, Chapter I). The philosophy of "natural rights", based upon the principles of the revolution of 1688, was the conscious philosophy of the leaders of the American struggle for independence, as is evident from the writings of Jefferson, Madison, Taylor and other authors of our Constitution.

Extensive citation of this history would only cover ground which has been covered previously by this Court. As illustrative we confine ourselves to the words of James Madison in the course of the debate on the Sedition Act in 1798:

> ". . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same

[39] See Chafee: Free Speech in the United States (1946 Edition) P. 21; Nevins, The American States During and After the Revolution (1924) PP. 18-19; 2 Writings of Samuel Adams (1906) 101; 47 Proceedings of the Massachusetts Historical Society, 191-4; 2 May Constitutional History of England (3rd Edition 1899) 112.

beneficient source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"[40]

Even if terms such as "hatred" or "contempt" were carefully defined by the statute, it would still be unconstitutional as inconsistent with the First Amendment, but the statute nowhere defines those terms. Nor is there any commonly accepted meaning to these terms. The absence of any guiding standards must render provisions based on the use of such terms defectively vague. As the court said in *Winters* v. *People of the State of New York*, 333 U.S. 507, 509:

"... It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Stromberg* v. *California*, 283 U.S. 359, 369; *Herndon* v. *Lowry*, 301 U.S. 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amend-

[40] 4 Madison's Works 544 (Report on the Virginia Resolutions).

ment, violates an accused's rights under procedural due process and freedom of speech or press."

Obviously here the charge is so broad "as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech." What constitutes "contempt" of our government or speech which would encourage others to commit acts holding our government up to hatred or contempt must have as many varying definitions as there are people to define it. The statutory language here is even less susceptible of definition than terms such as "*sacrilegious*" held by this court to be unconstitutionally vague.

In *Burstyn v. Wilson*, 343 U.S. 495 (1952) this court passed on a New York statute which permitted censorship of motion picture films on the ground that they were "sacrilegious." The court in striking down such legislation as unconstitutionally vague and an unconstitutional restriction on freedom of speech noted at p. 504:

> "New York's highest court says there is 'nothing mysterious' about the statutory provision applied in this case: 'It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule . . .' This is farm from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demand of other interests of society. In seeking to apply the broad and all inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies."

This would seem a dispositive of this count of the indictment. For if the words "contempt", "scorn" and

"ridicule" are so incapable of definition as to be impermissible in a censorship statute, the words "hatred and contempt" here used are impermissibles in a sedition statute."

Counts III, IV, and VIII are similarly defective. And Counts V, XI, and XII allege, in one form or another that respondent had engaged in conduct which was "seditious". These counts are defective for the same reason as Counts III, IV and VIII, since "sedition" is defined by the statute, in part, as conduct, the intent of which is to bring the government into hatred or contempt. The charge of sedition, therefore, embraces a charge of bringing the government into hatred and contempt and is subject to the same constitutional infirmities. The trial court instructed the jury clearly on this matter (R. 1391, 1393). Its reading of the statute was quite accurate, however deficient may have been its understanding of the broader issues of the constitutional law.

Conclusion

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be affirmed.

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[1] The Supreme Court of Pennsylvania had grave doubts as to the constitutionality of Subd. (c) of the statute. For reasons already noted it did not pass upon the matter. See footnote 1 to the Opinion of the Court (R. 51-52).